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No. 528

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1947

JOINT COUNCIL DINING CAR EMPLOYEES, LOCALS 456 and 582, for and in behalf of Bertram Hicks, waiter, and other employees similarly situated,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation.

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals, Ninth Circuit

and

BRIEF IN SUPPORT THEREOF.

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Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation.

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals, Ninth Circuit.

May it please the Court:

The undersigned on behalf of Joint Council Dining Car Employees, Locals 456 and 582 (for and on behalf of Bertram Hicks, and other employees similarly situated) pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in this case, numbered therein No. 11566.

OPINIONS BELOW.

The memorandum opinion of the District Court, Northern District of California (R. 260) is unreported.

The opinion of the Circuit Court of Appeals (R. 284) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 9, 1947. (R. 302.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. 28 U.S.C § 347(a).

The jurisdiction of the District Court came from the Railway Labor Act of 1934, Section 3, First (p). 45 U.S.C. § 153, First (p). The suit was brought thereunder to enforce a reparation order issued by National Railroad Adjustment Board, based upon an award by the Third Division.

QUESTIONS PRESENTED.

1. Whether, in a suit to enforce a reparation order and award of National Railroad Adjustment Board, a Circuit Court of Appeals may bypass the respective findings of the District Court and of a division of the Adjustment Board, based upon sufficient evidence, and independently find the facts *de novo* upon a reweighing of the evidence.

2. Whether, in such a suit, the court below erred in ruling that the employee must carry the burden of proving the validity of the award instead of the railroad carrying the burden of proving invalidity.

3. Whether, when the jurisdiction of National Railroad Adjustment Board depends upon a fact (i.e., whether

a collective railway labor contract covering a particular railroad system embraces as a working condition and not as wages a custom or usage of free meals while on itinerant duty), can the Board's fact finding of its own jurisdiction be mutilated and the Board's jurisdiction destroyed by a Circuit Court of Appeals asserting argumentatively that it is not a fact issue but a law issue?

STATUTES, RULE AND REGULATION INVOLVED.

(a) **Railway Labor Act of 1934**, Section 3, First (p). 45 U.S.C. 153, First (p).

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be **prima facie** evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by

writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

[Copied word for word *mutatis mutandis* from Act to Regulate Commerce, § 16, as recast into § 16(2) by the Hepburn Act of 1906. 49 U.S.C. § 16(2). For similar copying into some other statutes on enforcement of reparation orders see: 7 U.S.C. §§ 209, 210, Packers and Stockyards Acts (Secretary of Agriculture); 46 U.S.C. §§ 829, 1114, United States Maritime Commission; 47 U.S.C. §§ 206-209, 407, Federal Communications Commission; 7 U.S.C. § 499 g (c), Perishable Agricultural Commodities Act, 1930.]

(b) **Federal Rules of Civil Procedure.**

52(a). * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * *

(c) **Fair Labor Standards Act of 1938.** 52 Stat. 1060, 29 U.S.C. §§ 201-219.

Statute:

§ 3 (29 U.S.C. § 203). Definitions.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

Regulation: (29 U.S.C. §§ 516.1-541).

§ 531.1(d). 29 U.S.C. § 531.1(d).

(d) The cost of furnishing "facilities" which are **primarily for the benefit or convenience of the employer** will not be recognized as reasonable and may not therefore be included in computing wages.

STATEMENT.

(a) **Findings of the District Court.** (R. 264.)

1. Respondent is, and continuously since the year 1934 has been, a common carrier of passengers by railroad within the meaning of the Railway Labor Act (45 U.S.C. § 151 et seq.), said railroad being known as Pacific Lines of respondent.

2. There is, and continuously since the year 1934 has been, in the employ of respondent within the meaning of said Railway Labor Act a craft or class of employees known as dining car waiters.

3. Petitioner, Joint Council Dining Car Employees, Locals 456 and 582, is and continuously since the year 1934 has been the representative of said craft or class under and for the purposes of said Railway Labor Act.

4. Continuously since the year 1936 there has been in effect between petitioner and respondent an agreement concerning rates of pay, rules and working conditions of said craft or class of dining car waiters, whereby and whereunder as one of said **working conditions** meals were to be supplied in the dining cars of respondent to the members of said craft or class, without cost or charge to them, while on itinerant duty in said cars in the course of their employment, and primarily for the benefit and convenience of respondent.

5. Notwithstanding the premises, and in breach of said agreement, respondent charged the members of said craft or class for such meals during two periods of time, i.e., a first period extending from March 1, 1941, to August 31, 1941, (when the minimum wage rate of the members of said craft or class was 36 cents per hour), and a second period extending from August 31, 1942, to January 31, 1943, (when such minimum was 40 cents per hour).

6. [Identifies, as the beneficiaries[1] of the judgment, the members of craft or class of waiters thus charged in breach of agreement and details the amounts.]

7. The aggregate of the wrongful charges set forth in paragraph 6 hereinabove is $72,000.43 * *, which resulted in payroll net payments to said individual members in an aggregate of $58,506.53[2] * * less than they should have been paid, net after applicable deductions under the Carrier's Taxing Act of 1937 and the Federal Withholding Tax. None of said $58,506.53 has been paid.

8. A grievance dispute in the premises between respondent and said employees was duly and regularly initiated and progressed under Section 3 (45 U.S.C. § 153) of said Railway Labor Act and terminated in the award and order of the Third Division of National Railroad Adjustment Board which are annexed as Exhibits A and B to the present petitioner's amended petition. The present petitioner is identical with the petitioner before said Board in said grievance dispute.

(b) **Findings of the Board.** (R. 24.)

FINDINGS

The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing

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[1]Approximately 2,700 waiter-beneficiaries.

[2]Distributable among the 2,700 beneficiaries in an average principal amount of about $21.00 each, from a low of three cents (to Neathan Newman) to a high of $129.92 (to Milton A. Aiken). The calculation of their amounts illustrates the method used for all, to-wit:

	Newman	Aiken
Hours worked	37:00	1531:30
Total compensation paid	$14.76	$451.30
Payable under wage orders	14.80	612.60
Difference	.04	161.26
Carrier's Taxing Act	.00	4.84
Federal Withholding tax	.01	26.50
Balance due	.03	129.92

thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the carrier violated the effective agreement by charging the claimant for meals, as alleged in the claim.

AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

[The portion of the Opinion disclosing that in 1936 a collective agreement covering working conditions (which incorporated by reference the carrier's unilateral rules of 1922 covering working conditions) included as a parol integer[3] a practice or usage as to meals while on itinerant duty, is as follows]: (R. 22)

As of July 1, 1922, the carrier promulgated seventeen rules governing the hours of service and **working conditions** of its dining car employees. The petitioner became the representative of said employees in 1934 and in 1936 said rules were referred to as their "current Agreement" and which limited the application of one of said rules. During the following year the carrier filed said rules and memorandum with this board, in compliance with a request for copies of its effective agreement with its dining

[3] "It is well settled that parties who contract on a subject matter concerning which known usages prevail, incorporate such usages by implication into their agreements." *Hostetter v. Park*, 137 U. S. 30, 40. *Nicoll v. Pittstein Coal Co.*, 2 Cir., 269 Fed. 968, 971 and 972; Williston, *Contracts*, §§ 648, 653; Wigmore, *Evidence*, §§ 2400, 2401; *Buckner v. A. Leon & Co.*, 204 Cal. 225, 227, 267 Pac. 693.

car employees. Under these circumstances, we cannot sustain the contention of the carrier to the effect that there is no binding agreement between the parties. The fact that there is not in evidence a formal document bearing the signatures of the parties is of no consequence.

It appears that it was the established practice of the carrier at the time it promulgated its 1922 rules to furnish free meals to its dining car employees on duty en route. This practice was continued after said rules were accepted by the parties as their working agreement. "Where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself." * * We conclude, therefore, that the carrier is under a contractual obligation to furnish free meals under the circumstances of this case and that this service is not a mere gratuity or one that may be charged for at will.

(c) **Findings of the Circuit Court of Appeals.**

[These appear as proposition headings A and B at R. 289 and R. 291.]

A. The eating, on the Waiters' own time, of meals furnished as a part of the "price" for their working at all, is not a "working condition".

B. The district court erred in holding that the Waiters have maintained their burden of proof that the meals customarily given them, which they admit are a part of the price the Railway pays for their services, are primarily for the benefit of the Railway.

(d) **The paper record before the Board.**

The unique character of the informal procedure before the Board was noted by this Court in marginal note 4 to the opinion on original hearing in *Burley*, 325 U.S. 711, at 714. Additionally, we annex as Appendix A the Board's

own[4] exposition of the procedure before it, as contained in its response to the questionnaire from the Attorney General's Committee on Administrative Procedure[5].

At bar, the record before the Board is as follows:

R. 77. *Petitioner's notice of intention* to file a claim under an *ex parte* Submission.

R. 79. *Petitioner's* ex parte *Submission,* containing Statement of Claim (R. 79), Statement of Facts (R. 80), and Position of Employees (R. 86).

R. 100. *Carrier's submission,* consisting of Statement of Facts (R. 101), Position of Carrier (R. 110), Argument in Support of Carrier's Position (R. 111), and Conclusion (R. 136). Annexed are the Carrier's exhibits thereto: Ex. A-1[6] (R. 139), "Rules governing the hours of service and working conditions of dining car cooks, waiters, etc.", promulgated by the carrier to "take effect as of July 1st, 1922" (R. 143); Ex. A-2[7] (R. 144) "Mediation Agreement A-438", concerning "rates of pay", signed at San Francisco March 16, 1938; Ex. A-3[8] (R. 147), Mediation Agreement A-1093, concerning rates of pay "effective February 28th, 1942" (R. 148); Ex. A-4[9] (R. 153), "Agreement" increasing rates of pay, between "par-

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[4]The Board's procedure merely continues the practice and procedure originated under the national boards of adjustment created under the United States Railroad Administration during the first World War.

[5]We take this from white pages 20 to 26 of what is called a "Compilation" in possession of the Court, as indicated in a marginal note of the brief for the United States *amicus curiae* on rehearing in the *Burley* case. The "Compilation" is "Compiled by Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, 5710 Grand Central Terminal, New York City", and has a cover description, "Inquiry of the Attorney General's Committee on Administrative Procedure relating to The National Railroad Adjustment Board; Historical Background and Growth of Machinery set up for the Handling of Railroad Labor Disputes, 1888-1940".

[6]Incorporated at R. 102 in the carrier's Statement of Facts.

[7]Incorporated at R. 102 in that Statement, as the first collective agreement with the waiters concerning rates of pay.

[8]Incorporated at R. 103 in that Statement.

[9]Incorporated at R. 105 in that Statement.

ticipating carriers" and "fifteen cooperating railway labor organizations", signed at Washington January 17, 1944 (R. 159); Ex. A-5 (R. 162), Wage and Hour Division, "Railroad Wage Order", fixing a minimum wage "of at least 36 cents an hour on and after March 1, 1941", increased in Ex. A-6 (R. 165) by another order to "a wage of not less than 40 cents an hour on and after August 31, 1942"; Ex. A-7[10] (R. 168), "Findings of Fact and Conclusions of Law" in *Shelton v. M. K. T. Ry. Co.*, U.S. District Court, Eastern District of Missouri.

R. 177. *Employees Oral*[11] *Argument.*

R. 192. *Carrier's Reply to Petitioner's* ex parte *Submission.* Annexed are the Carrier's exhibits thereto: Ex. A-8[12] (R. 231), article appearing in an issue of a periodical published by petitioner; Ex. A-9 (R. 236), Wage and Hour Division press release for March 6, 1941.

R. 237. *Carrier's Answer to "Employees Oral Argument".*

R. 246. *Employees Rebuttal Statement.*

R. 258. *Appearance Sheet,* at hearing before Third Division on September 18, 1944.

The foregoing comprises the *paper* record before the Third Division of the Board as it stood "submitted" before deadlock of the bi-partisan members by their evenly divided votes. After the appointment of a neutral referee appointed for the particular case to break the deadlock all proceedings before him are oral and are not reported,[12a] stenographically or otherwise; in the oral pro-

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[10]Incorporated at R. 110 in that Statement.

[11]In practice *written* arguments filed at the hearing are titled "Oral Argument".

[12]Incorporated at R. 219 into the Reply.

[12a]Under the original reparation statute from which the reparation enforcement section of the Railway Labor Act of 1934 was copied, the Circuit Court of Appeals for the Eighth Circuit decided *Atchison, T. & S. F. Ry. Co. v. Spiller,* 246 Fed. 1, rehearing denied, 249 Fed. 677, and reversed the judgment of the District Court enforcing a reparation order of the Commission. In the District Court the plaintiff rested on the report and order

ceedings the labor members and carrier members respectively make oral presentation to the referee, at times including *new* facts or arguments. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency,* 46 Yale L.J. 567, 579; Spencer, *The National Railroad Adjustment Board* (Univ. Chicago Press, 1938), 44 and 45; *Report of Attorney General's Committee on Administrative Procedure,* Sen. Doc. No. 8, 77th Cong., 1st sess., 187.

(e) **The evidence in the foregoing paper record before the Board,** with respect to the finding of a "working condition".

From the respective documents, supra, of the parties before the Board the following in substance appears:

On October 1, 1913, the carrier issued a "book of rules" governing the operation of dining cars, containing a rule[13] on "Free Meals" for waiters while on duty in dining cars. R. 81.

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of the Commission. The carrier then rested upon "the stenographers' notes of the hearings" (246 Fed. 6) before the Commission and moved for a declaration of law "that there was not sufficient evidence before the Commission to sustain its order of reparation" (246 Fed. 4), which was denied by the District Court, but which ruling was reversed by the Circuit Court of Appeals. In reversing the latter (*Spiller v. Atchison, T. & S. F. R. Co.,* 253 U.S. 117) this Court ruled that because all of the showing before the Commission was not included in the record before the District Court, that "obviously we could hardly sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced". 253 U. S. 125.

[13]Containing a rule 14 headed "Free Meals", reading:

"14. Cooks must be notified by waiter or party turning in the order that it is a 'free meal for crew'. Same is to consist of articles already prepared, or such others as in the judgment of the chef and under conductor's instructions are desirable to serve the crew. In case the crew desires sirloin steak, oysters, game, chicken, ice cream or other articles not in the conductor's opinion necessary and proper, he will make out and collect usual checks at full rates." (R. 81.)

On July 1, 1922, the carrier promulgated seventeen "Rules governing the Hours of Service and Working Conditions of dining car cooks, waiters, etc."[14] In 1934, (pursuant to the Railway Labor Act of 1934) petitioner became the representative of the craft or class of dining car waiters in the employ of the carrier (R. 22) and in 1936 the seventeen rules of 1922 were referred to as the "current Agreement" of the parties. In 1937 the carrier filed "said rules" with National Railroad Adjustment Board "in compliance with a request" of the Board "for copies of its effective agreement with its dining car employees" (R. 22[15]). In negotiations between petitioner and the carrier "it was expressly understood by both parties at the time of negotiations that the historical custom of furnishing meals at the carrier's expense would be continued" and that understanding "became, as it were, an agreement between the parties" (R. 86). The understanding was never reduced to writing (R. 88).

In 1939 the carrier in a letter to the Railroad Retirement Board, with respect to free meals eaten by its dining car stewards (R. 94) said:

> "Meals are furnished to this class of employees only while en route on dining cars of this company in their capacity of stewards; and as a **'convenience to employer'** to avoid necessity of delaying trains at stations en route, etc. Meals are not furnished at home terminals on days off or while awaiting turn to be sent out as a member of the crew of a dining car.

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[14]R. 221 (referee's opinion), 80 (employees' statement), 102 (carrier's statement). Printed at R. 139 as carrier's Exhibit A-1.

[15]This is stated by the Referee from an inspection of the contract files of the Board. Railway Labor Act of 1934, section 5, Third (e), 45 U.S.C. § 155, Third (e) requires carriers to file "a copy of each contract with its employees in effect on the 1st day of April, 1934, covering rates of pay, rules, and working conditions", and subsequently to file copies of such contracts "when any new contract is executed or change is made in an existing contract with any class or craft of its employees", etc.

> These meals are considered reasonable **traveling expenses** incurred while performing duties for this company. The value of these meals has no relation to the 'compensation' of the employee. There is no differential between employees who on some runs have fewer meals than those on other runs, nor does the employee have the option of added cash 'compensation' if he should choose to take fewer meals."

In the carrier's concurrent[16] submission (R. 100) the custom of free meals was admitted but it denied any *written* agreement about it. It stated (R. 109):

> "There is no existing agreement, nor is there any defined understanding, rule, or practice which obligates the carrier to furnish or supply, free of charge, any meals or all meals to dining car employes of the class to which [dining car waiter] Hicks belongs, either while such employes are on duty or otherwise; nor is there any such agreement, understanding, rule or practice which obligates any such employee to accept or consume all meals or any meals offered or furnished by the carrier.
>
> It is however customary for the carrier's dining car waiters and pantrymen while on duty to be supplied with and to eat their meals in the dining car upon which they are working; and no actual cash payment or deduction has been or is charged against or received from them by the carrier on account of such meals."

In the "Argument in Support of Carrier's Position" (R. 111) it argued (R. 118) that the dining car waiters were not obligated "to accept or consume such meals as the carrier may undertake to furnish" and that the waiters "have been and are being furnished" the meals "as one of the perquisites of their employment".

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[16]In the practice before the Board the "submissions" are not consecutively, but are concurrently, made, and hence neither party sees a copy of the other's "submission" until both submissions have been filed.

In the "Carrier's Reply to Petitioner's ex parte Submission" (R. 192) it stated (R. 199), "The custom exists, but it has never been made the subject of an agreement". At R. 209, it stated, "There is no *written* agreement covering the working conditions of dining car cooks and waiters. There is only a schedule [i.e., the 1922 document], which has been promulgated for the information of the employees but it has never been executed by the parties". At R. 210 it stated, "The practice is correctly described by petitioner as a 'custom'; but it does not constitute an agreement, because neither party has negotiated with the other upon this subject". At R. 218 it stated, "There can be no doubt that the purpose of the petitioner" "is to attempt to support the view that the meals furnished to the claimants were solely for the benefit and convenience of the employer, and not in any sense for the convenience of the employe".

In the petitioner's document entitled "Employees Oral Argument" (R. 177) it is stated (R. 180):

> "The Carrier itself has admitted to the Railroad Retirement Board, on August 14, 1939, almost one year following the effective date of the Fair Labor Standards Act, that meals furnished to a Dining Car Steward were provided as a matter of Company 'convenience' and were 'considered reasonable traveling expenses incurred while performing duties for this Company.' * * This admission by the Carrier as regards the Dining Car Steward is not only **true as regards the claimants herein involved**, but the furnishing of meals to said claimants was also a contractual obligation of the Carrier—which could not be modified or changed in any manner except by the processes and procedures established by the contract and the Amended Railway Labor Act."

In the "Carrier's Answer to 'Employees Oral Argument'" (R. 237) it stated (R. 238), "There is no existing agreement of the character described, either effectively July

1, 1922, or at any other date. There is only a schedule, in form an agreement but never executed by the parties".

In the "Employees Rebuttal Statement" (R. 246) there occurs the word **"price"** (R. 253) that in the opinion of the Circuit Court of Appeals is used to destroy the findings of the Board and the District Court, by raising an *estoppel* against petitioner to contend that the meals were not part of wages but were furnished as a working condition. In the course of *argument,* petitioner merely used the word "price" in argumentative anthithesis to the *gift* theory at the basis of the carrier's argument. After recounting the history[17] of collective bargaining between the craft or class of dining car waiters and the carrier, the argument proceeded (R. 253):

> "Further, the contention of Respondent that an agreement covering Claimants does not exist cannot be sustained; for, even assuming that such rules, regulations, or practices as were in full force and effect at the time Claimants accepted employment in Res-

[17]Before the beginning in 1917 of the Railroad Administration of the first World War there was no collective bargaining by the waiters (R. 248). The Director General promulgated uniform rules governing working conditions of the craft on *all* the railroads through General Order No. 27, Supplements 18 and 27 (R. 248). Upon return of the railroads to their owners in 1920 the Railroad Labor Board [See Wolf, *The Railroad Labor Board,* Univ. Chicago Press, 1927] created by the Transportation Act of 1920 failed to settle pending nationwide requests for changes in working rules (R. 249), continuing existing rules in effect. In July 1921, it promulgated Decision 119 (R. 249), remanding negotiations on rules to the carriers and employees. Respondent Southern Pacific's craft of waiters being then without collective representation, respondent promulgated its rules in 1922 (R. 250; the seventeen rules are printed at R. 139). The waiters organized and presently their then representative and the carrier adopted those rules as the first collective agreement of the waiters and the carrier (R. 250). Through subsequent years and negotiations both sides have repeatedly recognized the rules as an adopted collective agreement (R. 250-252), both with "full knowledge of the historical practice prevailing on respondent's property with respect to furnishing dining car workers with meals and lodging" (R. 252).

pondent's service, became as it were, the terms governing such employment. In the first place, the record clearly indicates that the furnishing of meals and lodgings by Respondent was notorious, uniform and consistent throughout the entire railroad industry. It was certainly known among all dining car managements and workers. It was part of the **price** these managements were willing to pay to insure the desired service. As Petitioner has shown, this Respondent says of this historical practice:

> 'Meals are furnished to this class of employees while enroute on dining cars * * as a **convenience** to employers to avoid necessity of delaying trains at stations enroute, etc. * * '

This alone clearly proves that Respondent was not in a **gift-giving** frame of mind; but, since it was necessary for service requirements to furnish meals and lodgings to Claimants for the reasons stated, managements were willing to make such conditions part of the terms of employment."

(f) **The evidence in the District Court.**

Petitioner introduced as Exhibit 1 a certified copy of the record before the Board (R. 38), which is printed at R. 77 to R. 258. (The award (R. 21) and reparation order (R. 25) are admitted by respondent's answer, R. 33, par VII).

Petitioner next introduced as Exhibit No. 2 respondent's answers to our Interrogatories (R. 39 to 48). Therein *inter alia* the carrier said (R. 39):

> "It was the respondent's practice in 1922, as well as previously for many years, to furnish meals to dining car waiters while on duty, as an inducement to and incident of the service. Such meals were not furnished free, in the sense of being given as charity; but no specific or separate charge or deduction was made for them."

Further (R. 41):

> "The cost of meals furnished to dining car waiters has never been considered, in any negotiations, as part of the cash compensation of such employees. Such meals are furnished to such employees without separate charge, as an incident of and inducement to the employment. It is doubtful whether respondent obtains any benefit, other than the greater contentment of the employees, from the practice of furnishing meals in this manner; the primary benefit is realized by the employees. A dining car waiter is not required to accept his meals from respondent while on duty, as a prerequisite of the employment."

And (R. 43):

> "Following March 1, 1941, no bookkeeping or accounting changes were made with reference to the meals furnished to dining car waiters."

And (R. 46):

> "The meals customarily furnished by respondent to its dining car waiters, both prior to March 1, 1941, and thereafter, were furnished as a matter of practice, and as an inducement to and incident of the service; and while not furnished 'free,' in the sense of being given as charity or as to a beggar at the door, were a part of the benefits which said dining car waiters derived from their employment. No deduction or charge was ever made, on account of such meals, from the compensation payable to dining car waiters under agreed or accepted schedules or contracts, no matter what the level of the hourly compensation received by such waiters."

Petitioner next introduced as Exhibit No. 3 the payroll records of respondent for the relevant periods (R. 49).

Petitioner then rested (R. 50).

The carrier then called David T. Jacoby (R. 50), office manager of the carrier's dining car department, previously a clerk and statistician therein. He testified to the cost of

supplying the meals and how the cost was calculated (direct, R. 50; cross, R. 53). On redirect (R. 56) he said, "The meals furnished to dining car waiters by the company, without requirement that they pay their full price or a reduced price, are incidents of and inducements to the employment". On recross (R. 56) he said, "When I say the meals are an inducement, I mean they are a benefit to the employee, and are considered by the employee in accepting the position at the rate of pay". On cross-examination he further said (R. 57, 58):

> "I would not say it is a convenience to the railroad to furnish him his meals in the dining car. If the waiters and cooks in the dining cars would bring their meals along with them, I am inclined to believe they would find a place for them to keep their food. It is never done, however. It might and probably would be an inconvenience in the dining car. It would inconvenience the railroads to stop passenger trains at stations, so that dining car workers could go to a restaurant and buy their meals. **It is a convenience to the railroad** to provide meals for these waiters while the train is moving, so they won't have to get their meals some other way."

The carrier then called Raymond M. Ramsey (R. 60), a timekeeper in its dining car department. He testified to the mechanics of the payroll records and how a record of the meals was obtained and kept.

Next, some correspondence was introduced, showing the beginning of the controversy about charging for meals.

The carrier then rested (R. 65).

(g) **The carrier's concession in the Circuit Court of Appeals.**

On the carrier's appeal to the Circuit Court of Appeals it at last conceded the parol *contract* concerning the meals. It said[18] in that Court:

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[18]Page 17 of Appellant's Opening Brief.

"The Third Division expressly concluded 'that the carrier is under a *contractual obligation* to furnish free meals under the circumstances of this case, and that this service is not a mere gratuity or one that may be charged for at will' (R. 23). Appellant does not here challenge this conclusion."

SPECIFICATION OF ERRORS TO BE URGED.

In the Brief in Support, infra, the errors are specified.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below decides a federal question "in a way probably in conflict with" the applicable decision of this Court in *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711 (hearing), 327 U. S. 661 (rehearing). There, it was clearly ruled that in view of the Board's acquaintance "with established procedures, customs and usages in the railway labor world" an award reached through its expertise is entitled to strong presumptive weight and "one who would upset it carries the burden of showing that it was wrong". 327 U. S. 664.

The decision of the Court below merely reweighs the record before the Board, gives no presumptive weight to the award, and finds the controlling fact *de novo*; and in course of opinion and decision *reverses* the carrier's burden of showing that the award was wrong into an award beneficiary's burden of showing that it was right.

2. The decision of the Court below decides a federal question in a way probably in conflict with the applicable decision of this Court in *Spiller v. Atchison, T. & S. F. R. Co.,* 253 U. S. 117 (decided in 1920) which was a statutory suit to enforce in a federal district court a reparation order and award under the enforcement section of

the original statute which was literally copied in 1934 into the relevant section of the Railway Labor Act. In *Spiller* this Court ruled that "the scope of the judicial review" of a reparation award "is not so extensive" as to permit the judiciary to reach "a different conclusion" upon the record before the administrative if the latter's decision is "based upon substantial evidence". 253 U. S. at 126. That interpretation of the original statute was fastened to it upon enactment of the identical text in the Railway Labor Act, and thereby became part of the latter.

The decision of the Court below finds the controlling fact *de novo* upon a reweighing of the Board record and a conclusion that the evidence therein supporting the award is outweighed by opposing evidence.

3. The decision of the Court below is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *Compagnie Generale Translantique v. American Tobacco Co.*, 31 F. (2d) 663, and *Roberto Hernandez v. Arnold Bernstein*, 116 F. (2d) 849; and the Circuit Court of Appeals for the Fifth Circuit in *Texas & P. Ry. Co. v. Fresnillo*, 80 F. (2d) 144; and the Circuit Court of Appeals for the Seventh Circuit in *Cleveland, C. C. & St. L. Ry. Co. v. Blair*, 59 F. (2d) 478. Those decisions rule, under literally identical statutory text, that judgment favoring a reparation award and order is compulsory if the award is supported by any substantial evidence in the record before the administrative, and if the carrier does not meet the *prima facie* or presumptive effect of the award by going forward in the enforcement suit *in the District Court* with evidence of some *new* or *additional* fact or facts not appearing in the administrative's record.

The decision of the Court below in substance rules that it was empowered to refuse enforcement of the award upon a reweighing of opposing inferences derivable from

the record before the Board, without proof of any new or additional fact by the carrier in the enforcement suit in the District Court.

4. It would be most discreet of this Court to grant a certiorari and rule upon the subject matter under the Railway Labor Act, because:

(a) It is nationally important to the administration of the Railway Labor Act that administrative and procedural aspects of contract grievance adjustment under the Act be settled and clear.

(b) The impact of such a decision as that of the Court below is discouraging to peaceful resort to adjustment procedure before the Board with ensuing Court enforcement of a favorable award. The potency of that adjustment procedure as a possible contribution to peace in railway labor relations should not be weakened. This Court is acquainted with much of railway labor relations history. The train service brotherhoods, for example, have consistently chosen to enforce unpaid reparation awards through choice of the strike ballot instead of court enforcement. Some other railway labor unions have experimentally chosen court enforcement of Board awards. All of the railroad brotherhoods and unions freely resort to the Board and show willingness to bow to the Board's decision when unfavorable, but diverge in practice as to ensuing court enforcement when favorable. They honor and respect the federal judiciary, but some seriously doubt whether all members of the lower federal judiciary are as experienced and competent in the facts of railroad operating practice as the personnel composing the Board. Contract grievance claimants should be told clearly by this Court that the federal judiciary is not to be feared as a self-appointed expert railroad super-board.

(c) The controversy is not a local one on the Southern Pacific. It is nation-wide. A number of carriers dis-

claimed any right to charge for meals but many, of course including the intransigents in labor relations who dislike collective bargaining in general and the Adjustment Board in particular, have obdurately resisted the individually small claims of the humble members of the craft of dining car waiters who seek payment of not less than a minimum wage. The final disposition of all such pending claims awaits the ruling of this Court in this case.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco,
January 8, 1948.

GEORGE M. NAUS,
CLIFTON HILDEBRAND,
Attorneys for Petitioner.

BRIEF IN SUPPORT.

Specification of Errors to be urged:

The Court below erred:

1. In bypassing the respective findings of the Board and the District Court and in finding a controlling fact *de novo*.

2. In ruling that the burden was on the claimant to prove validity of the award (instead of on the carrier to prove invalidity).

3. In finding that the furnishing of the meals was not a working condition.

ARGUMENT.

1.

The court below erred in bypassing the respective findings of the Board and the District Court and in finding a controlling fact de novo.

(a) The Court below misconceived the true appellate question, which was, simply: Was there before the Board any substantial evidence supporting the award? *not*, What is the weight and counterweight of the evidence before the Board? In *Spiller v. Atchison, T. & S. F. Co.*, 253 U. S. 117, under a statutory text literally identical in the present context, this Court ruled that when the evidence before the reparation administrative is subject to different conclusions the judicial inquiry in a suit to enforce is simply whether there is substantial evidence in support of the administrative conclusion. At bar, the award is supported by substantial evidence, as set out in the argument under Specification 3, infra.

Spiller was decided fourteen years before enactment of the Railway Labor Act of 1934 and therefore fastened an interpretation on the statutory language. When the Congress uses words which have received a judicial construc-

tion by *this* Court that construction becomes a part of the new statute. *Hecht v. Malley,* 265 U. S. 144, 153.

(b) With respect to the borrowed language of the original statute this Court in *Illinois Central R. Co. v. Interstate Commerce Commission,* 206 U. S. 441, at 454, said of the statutory provision of the *prima facie* effect of the Commission's findings, "This Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience"; and it added that that strength was "reinforced by a concurrent judgment of the Circuit [now District] Court". 206 U. S. at 455.

At bar there is like *concurrence* of the District Court in the decision of the Adjustment Board. And that Board is likewise "appointed by law and informed by experience". *Order of Railroad Telegraphers v. Railway Express Agency,* 55 F. Supp. 319, at 324, col. 2, and 325 (enforcement of Adjustment Board award; affirmed, 321 U. S. 342). And see *Washington Terminal Co. v. Boswell,* 124 F. (2d) 235, at 241, col. 2 (suit by a carrier for a declaration of invalidity of an award of the Adjustment Board).

(c) A Circuit Court of Appeals should not disturb a finding of the *District Court* when it is based on evidence subject to conflicting inferences. *Walling v. General Industries Co.,* 330 U. S. 545, at 550.

2.

The court below erred in ruling that the burden was on the claimant to prove validity of the award (instead of on the carrier to prove invalidity).

The specified error is abundantly clear from the ruling on rehearing in *Burley,* supra,[10] that "one who would

[10] *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U.S. 711 (hearing), 327 U.S. 661 (rehearing).

upset it carries the burden of showing that it was wrong". 327 U. S. at 664. And, under identical statutory texts, the Second, Fifth and Seventh Circuit Courts of Appeals, in the four cases cited in the Petition, supra, in Reason 3 for granting the writ, have uniformly so held in suits to enforce reparation awards of the Maritime Commission and the Interstate Commerce Commission. Those decisions (which stem from the foundation case of *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430) rule: The hearing in the District Court is *de novo* but the *prima facie* case made by the award prevails "unless overcome by evidence submitted by defendants" *in the District Court* (59 F. (2d) at 479, col. 1), i.e., *new* evidence introduced at the trial in Court (116 F. (2d) at 851, col. 2), showing that the award is "unfounded in fact" (80 F. (2d) at 145, col. 2). It is clearly implicit in those decisions that in the Court hearing a mere repetition or cumulation of matter previously weighed by the administrative in the course of reaching the award will not sustain the carrier's burden of disproof: the extrinsic fact must be *new*.

The burden of the carrier is to "bring forward evidence", and "it is to be presumed" that if any evidence exists the carrier "would have produced it". *Lewis-Simas-Jones Co. v. Southern Pacific Co.*, 283 U. S. 654, at 663, bottom.

At bar, the carrier's only[20] witness in Court, Mr. Jacoby, merely tracked the carrier's opinion, repeatedly stated before the Board, with a repetitive or cumulative opinion of the witness in Court that a waiter's benefit from eating "free" meals was an employment inducement to him, which obviously left *untouched* the basic question whether the working condition about itinerant meals in a dining car was a convenience or benefit to the carrier.

[20]The carrier's other witness, Mr. Ramsey (R. 60) testified only to accounting records.

Moreover, (1) on cross-examination the witness admitted the convenience of the working condition to the carrier (R. 58), and (2) the judge of the District Court saw and heard the witness and made a finding, not clearly erroneous, against the carrier, thereby under Rule 52(a) FRCP, concluding the fact issue on the appeal to the Court below. *Walling v. General Industries Co.*, 330 U. S. 545, at 550.

3.

The court below erred in finding that the furnishing of the meals was not a working condition.

(a) The essence of the fact error in the Court below is in the pivoting of the appellate finding on the controlling fact of working condition, upon petitioner's argumentative use of the word "price" in antithesis to the carrier's argument that the meals were furnished as a *gift* (R. 253-254). That argument was not upon the fact issue of working condition versus wages, but upon the fact issue of contract *vel non,* which latter issue the carrier abandoned[21] in the appeal to the Court below, and thereby the argument about "price" versus "gift" was eliminated from the controversy. The obduracy of the carrier's denial before the Board of the existence of a collective *contract* about meals, by conjuring an argument about *gift* of meals, persisted through the hearing in the District Court where the carrier's answer to interrogatories put the "gift" to the waiters as but a gossamer removed from a "free" meal that the carrier might give "as charity or as to a beggar at the door" (R. 46). The waiters were not recipients of charity. They contracted and *worked* for what they got, and the word

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[21]Under the Statement in the Petition for the Writ, supra, see subheading "(g) The carrier's concession in the Circuit Court of Appeals".

"price" as applied to what had been collectively *contracted* for with the carrier was equally apt in the argument context in description of a bargained working condition as in description of wages. It was used argumentatively simply as a colloquial synonym for the law term "consideration" as used in contract law. The citation of *Baltimore & O. R. Co. v. Brady,* 288 U. S. 448, 458, in marginal note 3 of the opinion of the Court below is inapt to the use the Court put it to. We have not changed an issue; we are not attacking an award in our favor, as was attempted by the award beneficiary in the cited case. We are *supporting* an award, and on an unchanged remaining issue. A simple "admission" does not create an estoppel, especially when put forward merely as an opinion in argument. *Martin v. Burgess,* 5 Cir., 82 F. (2d) 321, at 323, col. 2. An argument under an issue of fact does not stipulate or plead the fact controversy away. Moreover, the use of the word "price" should be construed in its context of use, in light of the purpose for which it was used and in connection with the circumstances and from the four corners of the *entire* statement in the course of which the word was used. 31 C.J.S. 1161, §§ 376 and 377. The basis for an asserted estoppel is therefore absent.

(b) The Court below laid a false premise through the grievously erroneous statement, "The case thus came to the District Court without any findings on the sole contention there presented", and therefore, "no question here exists concerning *prima facie* value of any finding of the Board". But there *is* a finding by the Board:

The Court below became seized of the false premise in a darkened vacuum of logic from which all history[22]

[22] "The life of the law has not been logic: it has been experience." Holmes, *Common Law,* 1. "The fallacy to which I refer is the notion that the only force at work in the development of the law is logic." Holmes, *Collected Legal Papers,* 180. "The

was excluded. The history in the present context is readily discoverable, in published documents[23] of the Director General of Railroads, and in the National Archives.[24] The history clearly discloses the initiation by the Railroad Administration of the railway labor relations practice under which, after exhaustion of negotiating effort "on the property"[24a] (as the railroad parlance goes), the adjustment of grievances or disputes under contracts for the first time in railroad history occurred "off the property" through reference to the Administra-

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rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know." *Idem,* 186.

[23]United States Railroad Administration, Director General of Railroads (Washington, Government Printing Office, 1920): *Decisions, Railway Board of Adjustment No. 1.* Idem: *Railway Board of Adjustment No. 2.* Idem: *Railway Board of Adjustment No. 3.* And see Wolf, *The Railroad Labor Board,* ch. IV, "The Adjustment of Labor Disputes during the period of Government Operation", pages 47 to 57. Also see *The National Archives: Handbook of Federal World War Agencies and their Records, 1917-1921* (Government Printing Office, Washington, 1943) page 469, "Railroad Administration".

[24]The National Archives: *Guide to the Material in The National Archives* (Government Printing Office, Washington 1940), page 199, "United States Railroad Administration, page 203, "Labor Division", subhead "Records", where it is stated that "Accession 11" embraces "320 feet" of records 1918-23. "They consist in large part of correspondence, statements of facts, exhibits, reports, agreements, recommendations, decisions, and other papers relating to particular disputes and complaints and are usually arranged by case number. The general labor relations files of the Division (113 feet) are arranged according to the classification plan of the Administration. Some of the records are indexed."

[24a]Under the former private control of railroads, if a labor union had a dispute with a carrier under a collective contract, and the dispute remained unadjusted after passing from a local level up through the hierarchy of union-carrier officer levels, the chief operating officer of the railway had the last negotiating word and if adverse the union had to acquiesce "unless a strike was called and a better adjustment was thereby obtained". Walker D. Hines, *War History of American Railroads* (New Haven, 1928) pages 155-156.

tion's national railway boards of adjustment. The boards were partisan boards, bi-partisan. If a board deadlocked, the matter was referred to the Director General as a neutral referee.[25]

Now, before reaching the adjustment board off the property, the parties had on the property become fully and thoroughly aware in the course of negotiations with respect to (1) the controverted portion of the collective contract, i.e., the nature of the claim, (2) the facts asserted by each, and (3) the position of each with respect thereto; and submission to the adjustment board occurred in submission papers (with supporting documentary evidence in the form of exhibits)[26] from the parties that in railroad parlance came to be known as "submissions". When the statutory national board was created sixteen years later it initiated no new procedure but simply continued in a procedure thoroughly familiar to the railway labor world. From the beginning the practice was to decide claims on a general finding, **"claim sustained"** or **"claim denied"**, with occasional slight variations of the laconic.

In the tens or hundreds of thousands of instances of grants or denials of awards by the War Administration's national boards of adjustment, the subsequent contract or voluntary system or regional boards until 1934, and the statutory national board since 1934, the foregoing practice and procedure has been unchanged. The railroad world has never had any difficulty in understanding what has been found and decided. Professions of difficulty have come occasionally in the later years only from lawyers and personnel officers of intransigent carriers opposed on

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[25] *Wolf*, supra, page 52.

[26] E.g., see U.S. Railroad Administration, Director General of Railroads: General Order No. 27 with its Supplements, Addenda, Amendments, and Interpretations (Washington, Government Printing Office, 1919), page 129, top.

general principles to collective bargaining and to adjustment boards off the property.

Under the reparation award enforcement statutes the administrative's findings are not required to be expressed "in the terms which courts generally employ in special findings of fact", if the award is fully understandable in the context of the claim and administrative record. *Meeker v. Lehigh Valley R. Co.,* 236 U. S. 412, at 428. The reparation award enforcement statute is not concerned "with mere forms of expression" in the administrative's finding, and the *prima facie* effect of the award may flow from a general finding of "the *ultimate* fact". *Mills v. Lehigh Valley R. Co.,* 238 U. S. 473, at 481-482. At the common law an award need not contain "special" findings, as "in this respect the same rule governs as is applied to the verdict of a jury". 5 *C. J.* 116, § 265. 6 *C.J.S.* 213, b. A general verdict implies a finding of every fact necessary to support it. 5 *C.J.S.* 395. A decision "claim sustained" or "claim denied" is essentially no different in substance from the general verdict of a jury, or a finding in a jury-waived case at law "that all the allegations contained in the complaint or answer are true or untrue, as the case may be" (64 *C.J.* 1253, § 1100). A general verdict "is a finding in favor of the prevailing party of every material fact properly submitted to the consideration of the jury". 64 *C.J.* 1053, § 847. Neither a general verdict nor a non-jury general finding is bad for informality if its meaning is sufficiently clear to be the basis of a judgment, if it can be made definite and certain by reference to the pleadings, evidence and record. 64 *C.J.* 1065 § 874. Error in form not affecting substance is not ground for reversal. 5 *C.J.S.* 1182 (verdict); 1194, § 1788 (non-jury findings).

The award (R. 24) at bar is, "Claim sustained to the extent indicated in the opinion and findings". The incor-

porated "finding" (R. 24) is, "That the carrier violated the effective agreement by charging the claimant for meals, as alleged in the claim". The allegations of the claim include an allegation of violation of "practices existing upon the premises of furnishing free meals to dining car employees on duty in service of the carrier" (R. 79), amplified in petitioner's "Submission" as "a convenience to employer to avoid necessity of delaying trains at stations en route", and as being in the nature of "reasonable travelling expenses incurred while performing duties" for the employer (R. 94). It may be said here, as was said in the Fourth Circuit in *Virginian Ry. Co. v. System Federation,* 131 F. (2d) 840, 844-845, that an objection of indefiniteness in such an award "is highly technical" and will not be sustained if the award "is no puzzle" to the Court; and that Court affirmed 39 F. Supp. 881, wherein at 883, col. 2, the District Court had ruled with respect to the general finding ("Claim of employees sustained to the effect", etc.), "This conclusion must be considered in relation to the contentions of the parties made before the board and revealed in other portions of the decision".

Moreover, there is an express finding, "That this Division of the Adjustment Board has *jurisdiction* over the dispute involved herein" (R. 24). The jurisdiction of the Board is over "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or *working conditions*". Railway Labor Act of 1934, Section 3, First (i), 45 U.S.C. § 153, First (i). The dispute set out in the "Submission" to the Board concerned a *working condition.* The dispute was not over wages. The referee's opinion expressly excluded any wage question (R. 23-24). The award was (R. 24), "Claim sustained to the *extent* indicated in the opinion and findings", the *extent* being a contract concerning a *working condition.* "To say

more", said the referee, "would merely becloud the issue".

(c) The Board either made a finding about a working condition or it did not. In either event the Court below erred in making an independent finding of its own. If the Board made a finding too indefinite for understanding by the judicial mind in the enforcement suit in Court then the award should have been remanded to the Board to make a definite finding. *System Federation v. Louisiana & A. R. Co.*, 119 F. (2d) 509, 513-514. If the Board made no finding the Court below should not have made the finding but should have remanded the case to the Board to find the fact. *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 566-568. What we have in this context is no mere technicality. The Railway Labor Act tenders a voluntary choice (*Moore v. Illinois C. R. Co.*, 312 U. S. 630) between the alternatives: (1) sue the employer in an ordinary suit in a Court of competent jurisdiction for damages for breach of contract, or (2) use the procedural machinery of the Act for adjustment of the claim through the Adjustment Board. The permitted choice of the latter becomes barren and the Act's board adjustment machinery is mutilated to the point of destruction when a Court usurps the board's function and power in the exercise of its expertise to find the facts of the dispute. And it is to be kept in mind that if Board adjustment is elected then an award denying the claim forever concludes the matter: "There is no room for a subsequent inquiry into the same question by the courts". *Berryman v. Pullman Co.*, 48 F. Supp. 542. But at bar the *Court* below denied the claim after the Board had sustained it, leaving no opportunity to the elected tribunal to find the supposed missing fact one way or the other. In result, therefore, petitioner has been ambushed.

(d) In reaching its independent finding of fact against a working condition the premise of the Court below is that

"the eating" of meals by the waiters was a benefit to them, *ergo* it was not a benefit to the employer. The finding of the Board and of the District Court (R. 265) was not limited to "benefit"; the fact was found in the conjunctive, "primarily for the benefit *and convenience* of" the employing carrier.

The situation is not one of mutual exclusion. "Benefit" to one party does not exclude benefit to the other. Mutual benefit may be assumed. Without doubt one benefits by eating. The fact issue, however, is which receives the *primary* convenience and benefit, and which the mere *incidental*? The issue has been fully explored in income tax decisions. If the primary benefit is to the employee it is part of wages (income), but if benefit to the employe is merely incidental to the primary convenience and benefit of the employer it is not wages (income). The supposed force of the fact reasoning of the Court below vanishes upon inquiry into the reason why the receipt by an employe of an *incidental* personal benefit from a working condition is not a receipt of wages: an incidental saving of an employe's pocket from expense is not a receipt of wages. *Tennant v. Smith* (1892), A. C. 150; *Jones v. U. S.*, 60 Ct. Cl. 552 (1925); *Cordy v. Gordon* (1925), 2 K. B. 276; *Robinson v. Corry* (1933), 2 K. B. 521, 534-535, affirmed in the Court of Appeal (1934) 1 K. B. 240; *Benaglia v. Commissioner*, 36 B.T.A. 838[27] (1937), appeal dismissed, 97 F. (2d) 996. The decision in *Benaglia* was at first non-

[27]In a marginal note the Board's opinion cites many Bureau rulings: (1919) 1 C. B. 71, board and lodging furnished seamen; (1921) C. B. 4, 1544, itinerant fishermen; (1921) 4 C. B. 85, hospital employees living-in on 24 hours call; (1925) C. B. IV-2, 136-143, acquiescence in *Jones v. U. S.*, 60 Ct. Cl. 552, published as T. D. 3724, army officer's quarters; (1925) C. B. IV-2, 144, quarters of members of Coast Guard, Coast and Geodetic Survey, and Public Health Service; (1926) V-1 C. B. 32, domestics living-in and subject to call at any time. T. D. 4965 (C. B. 1940-1, pages 13 and 14) amending regulations into their text in Reg. 111, sec. 29.22 (a)-3), explained by the Commissioner to the Collectors in Mimeograph 5023 (C. B. 1940-1, pages 14 and 15).

acquiesced by the Commissioner (1938-1 C.B. 35) but the non-acquiescence was later withdrawn, and the Commissioner acquiesced (1940-1 C. B. 1). In the judgment of the Board of Tax Appeals the issue, working condition or wage, is one of fact upon the circumstances of each case. In *Benaglia* the Board of Tax Appeals, after stating the circumstances of the employment in the case before it, said:

> "Under such circumstances, the value of meals and lodgings is not income to the employee, even though it may relieve him of an expense which he would otherwise bear. In *Jones v. United States, supra,* the subject was fully considered in determining that neither the value of quarters nor the amount received as commutation of quarters by an Army officer is included within his taxable income. There is also a full discussion in the English case of *Tennant v. Smith,* H.L. (1892) App. Cas. 150, III British Tax Cases 158. A bank employee was required to live in quarters located in the bank building, and it was held that the value of such lodging was not taxable income. The advantage to him was merely an incident of the performance of his duty, but its character for tax purposes was controlled by the dominant fact that the occupation of the premises was imposed upon him for the convenience of the employer. The Bureau of Internal Revenue has almost consistently applied the same doctrine in its published rulings.
>
> The three cases cited by the respondent, *Ralph Kitchen,* 11 B.T.A. 855; *Charles A. Frueauff,* 30 B.T. A. 449; and *Fontaine Fox,* 30 B.T.A. 451, are distinguishable entirely upon the ground that what the taxpayer received was not shown to be primarily for the need or convenience of the employer. Of course, as in the *Kitchen* case, it can not be said as a categorical proposition of law that, where an employee is fed and lodged by his employer, no part of the value of such prerequisite is income. If the Commissioner finds that it was received as compensation and holds it to be taxable income, the taxpayer contesting this before the Board must prove by evidence that it is not income.

> In the *Kitchen* case the Board held that the evidence did not establish that the food and lodging were given for the convenience of the employer. In the present case the evidence clearly establishes that *fact*, and it has been so found."

It is not a question of *sole* benefit, but one of *primary* convenience and benefit.

The cases cited in the opinion of the Court below distinguish. The quotation from *Anderson v. Mt. Clemens Pottery Co.*, 69 F. Supp. 710, about an employee eating his lunch relates to an employee off duty, not to an itinerant employee on duty in a travelling dining car, with the equivalent of a travelling expense account in meals. *Shelton v. Missouri-Kansas-Texas R. Co.*, 3 C. C. H. Labor Cases No. 60036, is merely a transcript of findings of fact (copied at bar at R. 168) in a case between other parties, and of which the district judge in the case at bar said, "I cannot follow *Shelton* • • • because that cause was decided upon a factual record not disclosed in the decision" (R. 263). In Award No. 2699 between the waiters and the Milwaukee railroad, the defect of the Board referee's opinion is that it expressly states that it felt the Board bound by a Court decision in a case between other parties (*Brotherhood of Maintenance of Way Employes v. Nashville, Chattanooga, etc. R. Co.*, 56 F. Supp. 559), thereby failing to exercise an independent judgment of its own. On the same day that this Court decided the *Dobson* case[28] it also decided *Commissioner v. Heiniger*, 320 U.S. 467, *reversing* the judgment of the Board of Tax Appeals because it felt bound by a Court precedent and therefore did not exercise an independent judgment (320 U.S. at 470, bottom; and 475, end).

And the Court case cited supra (56 F. Supp. 559) was decided by the same district judge who had just decided

[28] *Dobson v. Commissioner*, 320 U.S. 489.

another case (although of similar title), 56 F. Supp. 552. A reconciliation of the two cases supports us. The Court ruled that the language of section 3(m) of the Fair Labor Standards Act, "customarily furnished by such employer", etc., means customarily furnished *as part of wages*. 56 F. Supp. at 557-558. In the one case the contract read $ x per month "plus board" and the board[29] was held to be wages. In the other the facilities were held to be a working condition.

The case of *Pacific American Fisheries v. U. S.*, 183 F. (2d) 464 merely supports a social security tax laid on "remuneration". Obviously, the basis for laying such a tax may be upon the value of a working condition as well as upon a wage.

The Fair Labor Standards Act bears on wages. It does not affect a *working condition*. The Railway Labor Act does not regulate working conditions but it deals with *contracts* about them; "it seeks to provide a means by which agreement may be reached with respect to them". *Terminal R. Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6. "The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce". 318 U.S. 6. The breach of a contract about them is within the jurisdiction of the National Railroad Adjustment Board. And a collective contract for free meals as an itinerant working condition is breached if the carrier by unilateral action charges for them without conference notice and collective bargaining. *Order of Railway Telegraphers v. Railway Express Agency*, 321 U.S. 342.

---

[29]It begets confusion at bar to say that the carrier "boarded" the waiters. They ate only about a third of their meals in their 240 working hours per month. In the remaining 480 hours of any month they ate at home. The distinction between "board" and occasional meals during an itinerant tour of duty away from home clearly appears in *Thibeault v. General Outdoor Advertising Co.* (Conn.), 158 Atl. 912.

CONCLUSION.

The writ should be granted and the judgment of the Circuit Court of Appeals should be reversed.

Dated, January 8, 1948.

Respectfully submitted,

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(Appendix A Follows.)

Appendix A

NATIONAL RAILROAD ADJUSTMENT BOARD
RESPONSE TO
CHECK LIST

ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE

PART ONE

ADJUDICATION AND LICENSING

I. STEPS PRECEDING OR SUPPLANTING FORMAL HEARINGS.

A. By whom is official action invoked

The National Railroad Adjustment Board was created by the Railway Labor Act of 1934, 48 Stat. 1185, Title 45, U.S.C., Secs. 151-88. It provides, in Section 3, First (i):

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

1. In the typical case, a labor organization appears as the petitioner. No individual person of a class or craft, for which a collective bargaining agency is recognized on the property of the respondent carrier, has ever obtained the majority vote necessary to obtain a hearing of his case except when represented by such collective bargaining agency.

2. Except as may appear from 1 above, persons indirectly affected do not invoke the Board's official action.

3-4. The Board's jurisdiction is not invoked by the public, and it does not act of its own motion.

5. The Board is required to act upon matters, when properly submitted to it, within its jurisdiction.

B. What is method of invoking official action

The Board is divided by the law, Section 3, First, (h), into four divisions, as follows:

> "(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:
>
> "First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.
>
> "Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.
>
> "Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car

employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees."

The Board has statutory rule-making power, Section 3, First, (u), as follows:

"(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section."

Under the rules of the Board, cases are filed in two ways:

First: "Joint" submissions:

In such submissions, the parties agree upon and state the facts if they are able to reach agreement; otherwise, each party shows separately the facts as they respectively believe them to be, and each side states separately its position.

Second: "Ex Parte" submissions:

In such submissions the moving party gives notice of intent to file an "ex parte" submission; whereupon, the Board requires each party to file independently within thirty days such party's "statement of facts" and "position."

A copy of the presently effective rules (Circular No. 1 and Resolutions re: Ex Parte Submissions, First Division, adopted June 18, 1935; Second Division, adopted March 27, 1936; Third Division, adopted October 9, 1935; Fourth Division, adopted September 27, 1935) is hereto attached and marked Exhibit "A". (Exhibit "A" is reproduced on pages 30 to 36 hereof).

As respects the check list: 1-2-3. The written submissions alone invoke the official action of the Board: 4. Forms are not utilized: 5. The submissions are not under oath: 6. No fees are chargeable to parties to disputes.

II. OFFICIAL ACTION FOLLOWING RECEIPT OF INITIAL COMPLAINT OR APPLICATION FROM PERSONS OUTSIDE THE AGENCY

A. Determination concerning further action

Such determination is made by each division, any determination requiring majority vote. Ordinarily handling is determined by application of the agreed rules; but where unusual questions arise a majority vote is required to determine their disposition.

B. Machinery and procedure for determining whether further action should be taken

All action, as referred to in A above, is taken by members of the Division without notification to the parties and without any preliminary hearing in which persons outside of a division participate in any way. On some cases in which preliminary consideration is given, it is decided to postpone all decisions until after hearing, and interested parties are given notice of the hearing in regular order, as hereafter described. Where the decision is not to accept a case for hearing, interested parties are notified by mail.

C. Where the agency proceeds upon its own motion, what is the course pursued prior to institution of decisive action

Not applicable.

III. THE INSTITUTION OF DECISIVE PROCEEDINGS

A. The pleadings

1. After a case is accepted, it is given a docket number by the Division with which filed, and the parties are notified thereof by mail. The case is set for oral hearing unless waived by the parties, and (a) a notice of hearing, referring to the docket number, (b) is mailed to the respective parties. (c) Submissions are not amended except to correct errors, or by agreement between the parties.

2. There are no "pleadings" in the sense of "complaint" and "answer," containing only allegations of claim and defense. The "submissions," in addition to the designation and signatures of parties, consist of (a) a statement of claim, (b) a statement of facts, and (c) the respective positions of the parties.

The parties are directed to state clearly the facts and arguments upon which they rely, to the end of enabling the respective Divisions to decide the cases presented. "Joint" submissions are expected to contain all pleadings deemed necessary by the parties respectively. "Ex parte" submissions are required to contain the facts and arguments deemed by the parties, respectively, to have bearing upon the issues as understood by them, respectively. After both parties file their "ex parte" submissions, the secretary forwards to each a copy of the other's submission. Under both procedures each party is permitted to make further written answer to the other. Details vary on the respective Divisions.

3. The defaulting party may not file answer without permission; and permission is customarily granted within reasonable limits.

4. The issues may be clarified at the hearing.

5. No requests for bills of particulars are entertained.

B. If final decisions, affecting the rights of parties, are reached without notice and hearing, explain the methods by which the decisions are made

If both parties waive oral hearing, the Division decides upon the written submissions.

C. Parties to the decisive proceedings

1. Parties submitting the dispute are given notices of hearing. They are with very few exceptions a labor organization proceeding for some one or more employees of a carrier, and the carrier. No other notices of the proceeding are given.

2. Other persons have not been permitted to intervene.

3. The agency does not participate in proceedings as a party.

4. The "public interest" is not represented other than by the Divisions.

5. All parties are entitled to be represented by counsel.

6. In the usual hearing, the employees are represented by Labor organization representatives, the carrier by its personnel officials. Occasionally a carrier or labor organization will be represented by an attorney.

7. No Division ever assigns counsel to a party.

8. The Divisions have no preference as to whether parties appear in person or by attorney.

D. Place and time of hearings, i.e., formal proceedings

1. Normally hearing is scheduled approximately 30 days after notice.

2. Hearings are held at the respective Division offices, 220 South State Street, Chicago, Illinois.

E. Conduct of hearings

1-2. Hearings are in the presence of the full Division membership, with the exception of such members as are occasionally otherwise engaged. The Division Chairman or Vice-Chairman presides. Each member has the opportunity to question the parties' representatives. On any motion covered by the rules, the Chairman rules; other matters are considered in executive session while the hearing is recessed. If a motion is not carried by majority vote of the Division, it fails of adoption.

The questions on the check list are not appropriate for application to the National Railroad Adjustment Board.

F. Selection of Examiners

None.

G. Functions of Attorneys

None.

H. The record of the proceedings

1. The Divisions do not make a practice of taking a stenographic record of the proceedings at hearings.

The First Division permits a party to make a private stenographic record of its own oral testimony.

The Second Division, upon request, has a stenographer take a record of the hearing, and a transcript thereof is available to either party.

In the one instance in which request to take a private stenographic record was made upon the Fourth Division,

the request was granted. In one instance, in the case of a hearing before a referee, in which a similar request was made on the Third Division, the request was granted. In both instances noted, when private stenographic records were made before the Third and Fourth Divisions, respectively, the private stenographic record was not made a part of the official record of the case.

2-3. See answer to 1.

4. Under the procedure described above (i.e., the petitions, or "submissions," to the appropriate Division).

(a) the facts are agreed upon or "stipulated" to the extent that the parties can agree,

(b) it has not been generally found necessary to limit "cumulative" evidence,

(c) or to make other attempts to shorten the record.

I. The process of proof

1. "Rules of evidence" as used in judicial tribunals are not sought to be applied at hearings.

2. There are no witnesses under oath.

3. Representatives are not subject to cross-examination.

4. Unsworn statements, written and oral, of the parties' representatives, are considered. Affidavits are sometimes tendered and received.

5-6. Depositions are not utilized.

7. There is an understanding that the Board members may refer to the copies of various agreements on file, also to decisions of the Railway Boards of Adjustment under Federal Control, the orders of the Director General of Railroads, the decisions of the Railroad Labor Board, court decisions, and decisions of the various adjustment boards and arbitration boards created by agreement.

Board members also refer to the Hearings and Committee Reports that resulted in the Railway Labor Act.

8. The Divisions take "official notice" of facts outside the range of "judicial knowledge" but within the range of knowledge acquired by the Divisions as specialized tribunals.

9. There is an effort to draw conclusions from what the parties say.

10. The Divisions make no independent factual investigations.

11. Records may be reopened after close of hearing only by Division order.

J. Securing or compelling evidence

1. The Divisions have no power to subpoena witnesses, books, and records.

2. The Divisions have no authority to require a representative to answer a question or produce evidence.

3-4-5. Not applicable.

6. Occasionally the Divisions have remanded cases in which there were extreme factual contradictions, with directions for a joint check by the parties. The Divisions have no power to compel compliance with such directions.

7. The Divisions have no power (a) to inspect premises, or (b) books and records, (c) to compel reports or the keeping of records of any kind.

K. Procedure after the record is closed

L. Proposed findings of fact

M. Proceedings before the head of the agency

N. Proceedings prior to decision by the agency

The items under the above headings of the check list are mostly inappropriate.

After the record is closed, each Division attempts to decide the case without further argument from the parties, written or oral. If a majority does not vote to sustain or deny the claim, the case is deadlocked under the following provision of the law (Sec. 3, First, (1)):

> "1) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees."

The practices vary on the Divisions after a referee is selected. Requests of the parties upon the First Division for the right to argue orally before, and file briefs with, referees, have been refused because of lack of majority vote to grant such requests. Requests to argue before referees have been granted by the other three Divisions. The Third Division formerly permitted the filing of briefs by the parties with the Referee, but latterly requests to file such briefs have not been granted by this Division. Similar requests have not been made on the Second and Fourth Divisions.

The members of the respective Divisions are expected to read the records. In practice, the carrier members dis-

cuss among themselves the merits of the cases, and one carrier member assumes the primary responsibility for handling the case for the carrier members. The labor members follow a similar procedure. When a referee is appointed, all members discuss the case with him, one labor member and one carrier member usually taking the lead, and often giving him written memoranda or brief's presenting their views.

O. The agency's decision

1-2-3-4-5-6. In cases decided without referee, the findings and award are such as are agreed upon by members. The "findings" are composed of both findings of fact, findings of law, and mixed findings of fact and law. The "opinions" on the Third Division more nearly approximate the opinions of courts than do the briefer processes employed on other divisions. In cases decided by a referee, the findings are generally written by him. All findings, the award, and a simple order to the parties directing what is required to be done, are served upon them by mail. Tentative findings are not served on parties. (Specimen copy of certain awards: First Division Nos. 473, 501, 1878, 2216, 3508; Third Division Nos. 360, 540, 844—attached as Exhibit "B".)—See pages 37 to 76 hereof.

7. Precedent is frequently relied upon both in argument and decision.

8. The divisions have, but have never exercised, the power to change decisions after entry.

9. The divisions have no clearly settled policy as to the doctrines of res judicata and estoppel by judgment.

10-11-12-13. Petitions for rehearing have been filed infrequently, and when filed have raised all the issues of the case, and alleged errors of the decision. All such petitions have been denied. There are no rules to cover; and such as have been filed have been considered upon their contents. No oral arguments thereon are heard.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 528

JOINT COUNCIL DINING CAR EMPLOYEES, LOCALS 456 and 582, for and in behalf of BERTRAM HICKS, waiter, and other employees similarly situated,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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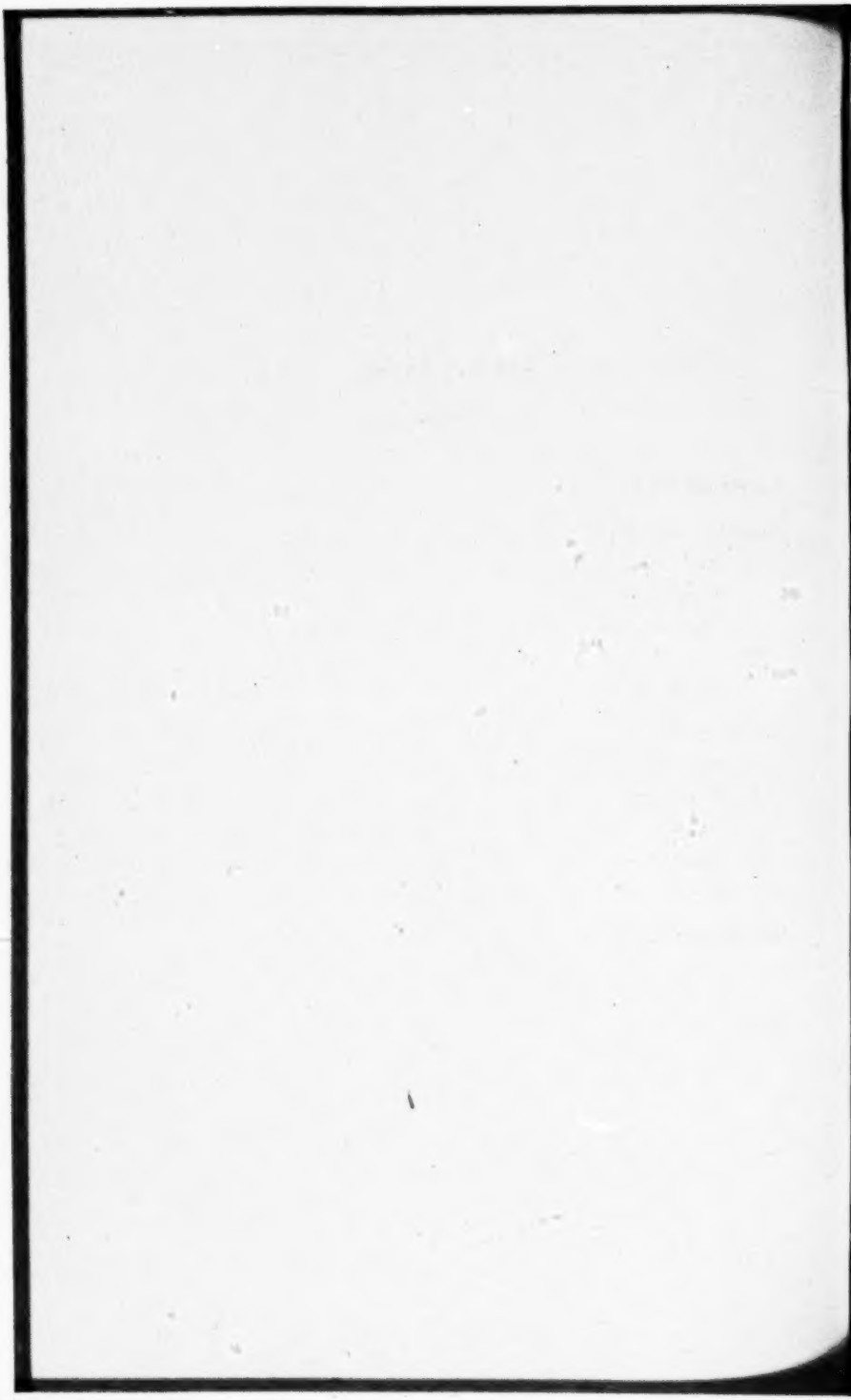

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Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

STATEMENT OF THE CASE

Respondent, in connection with its passenger train service, operates a considerable fleet of dining cars. The waiters on these cars are a part of the craft of respondent's employees known as "dining-car employees."

Effective July 1, 1922, respondent promulgated to its dining-car employees, including waiters, a schedule of rules governing hours of service and working conditions, but

not compensation (R. 139-143). About October 1, 1937, there became effective an agreement with the dining-car employees setting forth a schedule of their rates of pay (R. 144-146).

These schedules do not mention the practice of furnishing meals to these waiters while on duty. There never has been any written agreement relating to that practice. However, it has been and still is the custom for respondent to furnish meals in dining cars to waiters when on duty and performing service (R. 39-40). No separate charge or deduction ever has been assesed or collected on account of such meals; but they always have been customarily furnished, as an incident of and inducement to the employment, and an additional consideration for the services rendered (R. 39-42, 46, 56-57, 253).

Bertram Hicks, the employee mentioned in the title of this action, has been, since prior to March 1, 1941, and now is, a dining-car waiter employed by respondent.

On March 1, 1941, there became effective a Railroad Wage Order, promulgated by the Wage and Hour Administrator, which required that every employee of a trunk-line railroad be paid a "wage" of at least 36 cents for every hour employed (R. 162-165). That order defined the term "wage" in the following language, corresponding to Section 3, paragraph (m), of the Fair Labor Standards Act (29 U.S.C.A., Sec. 203(m)):

> "'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees. The term 'reasonable

> **cost' is to be not more than the actual cost to the employer of the board, lodging, or other facilities. Reasonable cost does not include a profit to the employer or to any affiliated person."**

Effective August 31, 1942, the Administrator promulgated a second Railroad Wage Order, which increased the minimum hourly "wage" of railroad employees to 40 cents (R. 165-168). This order defined the term "wage" in the same language quoted above.

When the first order became effective (March 1, 1941), the hourly rates of money compensation payable under the applicable agreed schedule to certain of respondent's waiters were less than 36 cents. For Bertram Hicks this rate was 32.5 cents (R. 43-44). There were also, on August 31, 1942, the effective date of the second order, certain agreed hourly rates of money compensation for waiters less than the 40 cents named in that order.

An agreed general increase in rates of pay became effective September 1, 1941 (R. 47-48, 147-153), which brought the hourly rates for all waiters above 36 cents. A similar general increase, effective February 1, 1943, brought their agreed hourly rates above 40 cents (R. 48, 153-159). Thus, the only periods when it was necessary to add the cost of meals to the money actually paid, in order to meet the wage order minima, were March 1-August 31, 1941, and August 31-January 31, 1943.

Both prior and subsequent to March 1, 1941, respondent in each calendar month calculated its reasonable actual cost of the meals furnished to and consumed by each waiter. The record of the meals so consumed is shown on meal checks bearing the several waiters' individual

signatures (R. 58-59). Throughout each of the two periods mentioned, the cash compensation paid each waiter, added to the reasonable actual cost of the meals furnished to and consumed by him, equalled or exceeded the minimum "wage" prescribed in the current Wage Order (R. 62).

The employee representatives objected to respondent's having included the meal costs in and as a part of the over-all "wages" payable under the Wage Orders (R. 63-64). The matter was handled under the Railway Labor Act as a "grievance" dispute between respondent and Bertram Hicks. When this handling failed to bring about a settlement, petitioner, on December 16, 1943, filed with the Third Division, National Railroad Adjustment Board, a notice of intention to present to that Board a claim against respondent (R. 77-78).

The claim having been docketed, petitioner and respondent filed with the Third Division their several submissions, replies, rebuttal statements, and written arguments (R. 79-258). The permanent members of the Third Division deadlocked on the claim and a neutral referee was appointed to resolve the deadlock.

Two issues were presented for decision by the Third Division:

1. Was respondent under a contractual obligation to furnish meals to its dining-car waiters?

2. Could respondent take into account and include its reasonable cost of such meals, in determining whether the minimum "wage" required by the Wage Orders was being paid?

On October 23, 1944, the Third Division rendered its Opinion, Findings, Award, and Order (R. 21-25). In its

Opinion the Division answered the first of the above questions in the affirmative. Ever since respondent has accepted that result. The Division expressly refused to answer the second of the above questions,* stating (R. 24):

> "The *wages* to which the claimant is entitled *is a matter of law,* rather than of contract. Section 16 of the act (Fair Labor Standards Act, 29 U.S.C.A. Sec. 216) contains appropriate provisions for its enforcement, but this is not the responsibility of this Board. To say more would merely becloud the issue." (Emphasis added.)

In its Findings (R. 24) the Division held that respondent had violated its agreement (to furnish meals) and in its Award (R. 24) sustained the claim, "to the extent indicated in the Opinion and Findings." Its order of October 23, 1944 (R. 25), directed respondent to make the award effective and to pay the money payments required thereby by January 1, 1945.

Following respondent's refusal to comply with the order, the present action was commenced in the District Court. The action was tried by the court without a jury. Petitioner's evidence was wholly documentary, consisting of the record before the Third Division (R. 38-39, 77-258), the interrogatories addressed by it to respondent and the answers thereto (R. 39-48), and all payrolls of respondent ("constructively" placed in evidence) (R. 49-50). Respondent produced both oral and written testimony (R. 50-65, 259).

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*However, in Award No. 2699 (copy attached as Appendix A), rendered 28 days later, the same Division made findings adverse to petitioner's contentions on the precise questions which it had expressly refrained from deciding in this case.

By Memorandum Decision and Opinion, dated September 13, 1946 (R. 260-264), the District Court held that the award and order in suit should be enforced, basing its decision on the factual ground that the meals furnished were a "working condition" supplied for the benefit and convenience of respondent, and the legal ground that such meals were not "board," within the meaning of Section 3(m) of the Fair Labor Standards Act (29 U.S.C.A. Sec. 203(m)). The District Court entered its Findings (R. 264-266), Conclusions (R. 267), and Judgment (R. 268-269) on November 30, 1946.

Appeal was duly taken by respondent to the Circuit Court of Appeals, Ninth Circuit, which on December 9, 1947, entered its Opinion (R. 284-302) and Judgment (R. 302-303) reversing the District Court. The Circuit Court based its decision on three grounds:

1. The Third Division made no finding on the question whether the cost of the meals furnished could be included in determining whether the prescribed minimum "wage" had been paid; so that no question existed concerning the prima facie value of a finding of the Division on this point under Section 3, First (p) of the Railway Labor Act (45 U.S.C.A. Sec. 153, First (p)).

2. The furnishing of meals by respondent to its waiters is not a "working condition"; but even if it were, it is part of the "price" or "wage" they receive for their services, and as such falls within the definition of "wage" in the Fair Labor Standards Act and the Wage Orders issued thereunder, unless within some exception provided in the Regulations of the Administrator.

3. Petitioner had not sustained its burden of showing that the meals were furnished primarily for the benefit and convenience of respondent, and thus were within such exception.

SUMMARY OF ARGUMENT

I.

The Reasons Assigned by Petitioner for Granting Certiorari (Brief, Pages 19-22) Assume a Situation Which Does Not Exist on the Record of This Case.

Each of the reasons assigned by petitioner for granting certiorari is based on the same general ground, i.e., that the Circuit Court failed to give controlling weight to the findings and order of a Division of the National Railroad Adjustment Board. This claim assumes for this case a fact which does not exist; for the Division made no finding on the principal issue, i.e., whether the meal cost was includible in "wages"; but on the contrary, expressly refrained from so doing (R. 23, 24). There being no finding by the Division on the question decided by the Circuit Court, there is nothing to which to apply the statutory *prima facie* evidence rule; for the statute provides only that the "findings and order * * * shall be prima facie evidence *of the facts therein stated.*" (Emphasis supplied.)

There is no conflict between the decision of the Circuit Court and those cited by petitioner (Brief, pp. 19-20). In each of those cases the administrative board or commission had made findings *of fact* which supported the order, and the only question involved was whether the

evidence before the board or commission supported the findings. Each case involved a statute which provided, as does Section 3, First (p), of the Railway Labor Act, that the findings and order of the board or commission should be *prima facie* evidence "of the *facts therein stated.*" Where a fact is *stated,* that statement is given *prima facie* evidentiary weight (if supported by substantial evidence); but if no fact is stated, there is nothing to which the presumption may attach under the statute. Such is the situation in the present case.

II.

The Circuit Court Did Not Exceed the Permissible Scope of the Appellate Inquiry.

The Circuit Court, in holding that the District Court erred in finding that the furnishing of meals to the dining-car waiters was a working condition, and also in finding that such meals were furnished primarily for the benefit and convenience of respondent, did not exceed the permissible scope of the appellate inquiry.

In a non-jury case where the evidence is primarily documentary, as in the case at bar, there is no reason for applying the principle that an appellate court will not set aside the findings of the trial court if there is evidence to support them. The trial court is in no better position to judge of the credibility of the witnesses and the weight to be given to the evidence than is the appellate court. *Aetna Life Ins. Co. v. Kepler* (C.C.A. 8), 116 F. 2d 1, 4; *Carr v. Southern Pacific Company* (C.C.A. 9), 128 F. 2d 764, 768; *Western Union Tel. Co. v. Bromberg* (C.C.A. 9), 143 F. 2d 288, 290; *Smith v. Royal Ins. Co.* (C.C.A. 9), 125 F. 2d 222, 224 (cert. denied 316 U.S. 695).

The controlling question is whether the meals supplied by respondent are part of the over-all "compensation" of the employees receiving them. On this question the District Court made no finding; its only finding was that the furnishing of such meals was a working condition (R. 264, 265). This finding the Circuit Court held to be erroneous (R. 289), but went on to state (R. 289):

> "If it were (a working condition), it nevertheless is a part of the wage or price."

Thus, while under the permissible scope of the appellate inquiry the Circuit Court was entitled to determine that the District Court's finding was erroneous, the court further held that such finding was immaterial, and considered that the result would be the same even if the finding were allowed to stand.

The meals furnished to the waiters being part of the price* for their services, i.e., "compensation," respondent was entitled to take their cost into account in determining whether the prescribed minimum "wage" under the Wage Order was being paid, unless such meals were within the exception provided in the Regulations of the Administrator, i.e., unless such meals were not "board," but instead were "facilities which are primarily for the benefit or convenience of" respondent. The District Court found that they were of the latter character. On this point like-

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See petitioner's own statement (R. 253): " * * the furnishing of meals * * * by Respondent was notorious, uniform and consistent throughout the entire railroad industry. It was certainly known among all dining-car managements and workers. *It was part of the price these managements were willing to pay to insure the desired service.*" (Emphasis supplied.)

wise the Adjustment Board had made no finding at all. The Circuit Court held (R. 291) that this finding was not supported by the evidence, i.e., the petitioner had not sustained its burden of proof. This holding is clearly within the scope of the appellate inquiry, and not a ground for certiorari. All the authorities are in accord, holding in identical circumstances that the reasonable cost of meals furnished by employers to employees pursuant to agreement, express or implied, may be included in determining whether the minimum wage under the Fair Labor Standards Act or the wage orders issued thereunder has been paid. *Shelton v. Missouri-Kansas, etc. R.R. Co.* (U.S.D.C. E.D. Mo.), 3 C.C.H. Labor Cases 60036 (R. 168); *Brotherhood, etc. v. Nashville & St. L. Ry.*, 56 F. Supp. 559; *Joint Council Dining-Car Employees v. Chicago, Milwaukee, St. P. & P. R. Co.*, Award No. 2699, Third Division, National Railroad Adjustment Board (copy attached as Appendix A); compare also, *Harris v. Lambros*, 56 F.(2d) 488; *Anderson v. Mt. Clemens Pottery Co.*, 69 F. Supp. 710; *California Employment Commission v. Black-Foxe Military Institute*, 43 Cal. App. (2d) Supp. 868; *Pacific American Fisheries, Inc. v. United States* (C.C.A. 9), 138 F. 2d 464.

ARGUMENT

I.

The Reasons Assigned by Petitioner for Granting Certiorari (Brief, pp. 19-22) Assume a Situation Which Does Not Exist on the Record of This Case.

Each of the reasons assigned by petitioner for granting certiorari is based on the same general ground, i.e., that the Circuit Court failed to give to the findings and order

of a Division of the National Railroad Adjustment Board the weight to which they are entitled. Section 3, First (p) of the Railway Labor Act (45 U.S.C.A., Sec. 153, First (p)), provides that in the trial of a suit to enforce the findings and order of a Division of the Railroad Adjustment Board:

> "* * * the findings and order of the division of the Adjustment Board shall be prima facie evidence of *the facts therein stated* * * *" (emphasis supplied).

Under this provision, petitioner's position would be well taken *only* as to *facts* stated in the order and findings of the Division (and supported by the evidence before the Division) to which the Circuit Court failed to give prima facie evidentiary weight. That, and no more, is the scope of the principle of the cases cited by petitioner at pages 19 and 20 of its brief.

As shown above in our Statement of the Case, the Division decided only one of the two questions presented to it and expressly avoided the question which the Circuit Court ultimately decided.* The Award here in suit provided that the claim was sustained "to the extent indicated in the Opinion and Findings" (R. 24). The Opinion must therefore be examined to determine the intended scope of the Award and Order (*Munsey v. Virginian Ry. Co.*, 38 F. Supp. 881). The Opinion shows clearly that the Division intended to make no finding of fact on the question whether or not the carrier (respondent) could take into account the reasonable cost of furnishing the meals in determining whether the applicable minimum wage was being paid.

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*But see the Division's Award 2699 (Appendix A) in which this question was squarely decided *against* petitioner's contention.

The only question decided by the Division in the Award in suit, and the only question on which it made any *findings of fact,* was whether the carrier was under a contractual obligation to furnish meals in addition to the money compensation provided for in the applicable agreement. There is no issue on this point, respondent having accepted the Division's finding.

The question litigated in both the District and Circuit Courts was the question upon which the Division in this Award made no findings. Upon that question, therefore, the provisions of Section 3, First (p), of the Railway Labor Act are inapplicable because there are no *"facts therein stated."*

In this behalf, the Circuit Court said (R. 289):

> "The case thus came to the district court without any findings on the sole contention there presented, i.e., Was the cost of the meals so contracted to be furnished not to be added to the cash wage in determining the minimum wage? That is to say, no question here exists concerning prima facie value of any finding of the Division under 45 U.S.C.A. 153 (p), providing that 'the findings and order of the division * * * shall be prima facie evidence of the facts therein stated.' "

Petitioner attempts to get around the situation which the Circuit Court so pointed out by arguing (Brief, pp. 27-32) that the words "claim sustained" must be construed to carry with them a finding of each and every *fact* necessary to support the claim. Thus it argues (Brief, p. 30) that these words have the same force and effect as a jury verdict. This argument is wholly specious. First, it ignores the fact, pointed out above, that the claim was

expressly sustained only "to the extent indicated in the Opinion and Findings" (R. 24); and that in the Opinion it was pointedly stated that the Division was refraining from making any findings on the question involved in this case. Second, if petitioner's contention were correct, the statutory provision that "the findings and order of the division * * * shall be prima facie evidence of the *facts therein stated* * * *" would cease to have any meaning. Petitioner's contention on this point is without any support, all of the authorities being to the contrary. See *System Federation No. 59, etc. v. Louisiana & A. Ry. Co.* (C.C.A. 5), 119 F.2d 509 (cert. denied 314 U.S. 656) where it is stated (p. 513):

> "The act (Railway Labor Act) contemplates not merely general conclusions, but precise and definite findings of fact and final and definite awards, capable of enforcement, not vague general outlines which must be filled in by the courts."

Compare also *Railroad Yardmasters of North America v. Indiana Harbor Belt R. Co.*, 70 F. Supp. 914, where it is stated (p. 916):

> "The order incorporates by reference the award and contains no added specifications. The award itself reads merely, 'Complaint disposed of per findings.' The findings recite, 'We find, as represented by petitioner, that the facts presented in this docket are contrary to the provisions of controlling Rule 7(a) of the Yardmasters' Agreement, and so hold.' This so-called finding is not a finding of facts; it is a conclusion of law. It is a conclusion based on facts that are not in the findings but apparently are in the 'docket,' whatever that may be. True, a statement of

claim precedes the findings but whether this statement is identical with the facts 'presented' in the docket is not revealed.

"Furthermore, the statement of claim itself is indefinite. It does not contain the names of the two yardmen over whom the dispute arose. Extraneous evidence would have to be adduced to give the award meaning.

"On this point, I think the following statement in System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., 5 Cir., 119 F.2d 509, 513, applies: 'The act contemplates not merely general conclusions, but precise and definite findings of fact and final and definite awards, capable of enforcement, not vague general outlines which must be filled in by the courts.' The provision in the Act that the findings and order shall be prima facie evidence of the facts stated therein requires the findings to be a definite and complete statement of the ultimate facts and not a legal conclusion based upon undisclosed findings."

The following statement made in *Hanks v. Delaware & H. R. Corp.*, 63 F. Supp. 161, 163, is also appropriate:

"In approaching the question the Court has in mind the language of the statute, 45 U.S.C.A., Sec. 153(p), to the effect that the findings and order of the Board shall be prima facie evidence of the facts therein stated. This provision is of little help in this particular case. The Board in its findings found only that it had jurisdiction, and that the claim should be sustained. Detailed findings of fact were not made, and the sustaining of plaintiff's award is more a conclusion than a finding."

In the light of these authorities, there is no conflict between the decision of the Circuit Court in this case and those cited by petitioner. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 327 U.S. 661 (Brief, p. 19), was not a suit to enforce an Adjustment Board Award, but involved rather the question of the authority of a collective bargaining representative to submit claims of individuals to the Adjustment Board, or to settle or compromise them with the carrier. This Court's language quoted by petitioner is to be read in the light of the question discussed, and particular note may be taken of the footnote reference (p. 664) to the statutory provision that the Board's award "shall be prima facie evidence of *the facts therein stated.*" (Emphasis supplied.)

Spiller v. A. T. & S. F. R. Co., 253 U.S. 117, upon which petitioner principally relies, decided only that the findings of the Interstate Commerce Commission would not be upset if the essential facts found were based upon substantial evidence before the Commission. That case is wholly distinct from the case at bar because in the *Spiller* case there were findings *of fact* by the Commission, to which the statutory rule could be applied. As this Court said (253 U.S. at p. 123):

> "The report contains appropriate findings adequate to support the award."

The same distinction exists between the present case and each of the others cited by petitioner in this connection (Brief, pp. 19-20). In each the Board or Commission whose order was sought to be enforced had made findings *of fact* which supported the order and the only question was whether these findings were in turn sup-

ported by substantial evidence. For example, in *Hernandez, Inc. v. Bernstein,* 116 Fed. 2d 849 (Petitioner's Brief, p. 20), the Court said (p. 850):

> "Thereafter hearings were held * * * resulting in *findings of fact* which supported the charges and on which an order was entered * * *." (Emphasis supplied.)

No useful purpose would be served by reviewing in detail the remaining cases cited. As stated, in each the same grounds of distinction are present. Each involved a statute providing, like Section 3, First (p), of the Railway Labor Act, that the findings and order of the board or commission should be prima facie evidence "of the facts therein stated," but each opinion shows that the facts were stated in the findings and order sought to be enforced. When, on the other hand, a fact without which petitioner cannot prevail is not stated by the Board, there is nothing to which the Court can give evidentiary weight under the statute. Such is the situation in the present case.

The remaining reason assigned by petitioner for the granting of certiorari (Brief, p. 21) has no basis in either law or logic. It is nothing but a thinly veiled threat to resort to self-help, i.e., a strike, unless this case is decided to its liking. Petitioner's position is that an Adjustment Board award favorable to the petitioning organization must be enforced, whether or not it is supported by the facts stated therein. This, of course, is not the law. As petitioner itself conceded elsewhere in its brief (p. 4), provisions identical with those in Section 3, First (p) of the Railway Labor Act have long been contained in other acts setting up administrative bodies, and their

force and effect is well settled by decisions. This case has been decided on the basis of the law, not because of threats; and no threat, no matter how thoroughly it might be carried out, should be permitted to disturb the well reasoned and legally correct determination of the Court below.

Petitioner, conceding *arguendo* that the essential finding is lacking, asserts that it has been "ambushed" (Brief, p. 32). The position in which petitioner finds itself is of its own making. Upon securing an award and order which failed to include any finding of fact on the pivotal question, petitioner had the alternative of either (1) requesting the Division to make a finding upon this question; i.e., "interpret the award" (Section 3, First (m), Railway Labor Act, 45 U.S.C.A. 153, First (m)), or, (2) endeavoring to enforce the award without such a finding, in which case it would not have the benefit of the prima facie evidence rule, because there were no "facts therein stated" on the pivotal question. Petitioner elected the second alternative for a very obvious reason. The award and order in this case were entered October 23, 1944. Twenty-eight days later (November 20, 1944), the *same* Division of the Adjustment Board entered its Award No. 2699 (copy attached as Appendix A), in which it made findings adverse to petitioner's contentions on the precise questions which it had expressly refrained from deciding in the award and order involved here. Petitioner therefore preferred to proceed with its suit, with the hope that even without the statutory presumption, it might be able to make its proof on the issue. Having elected to take this chance by suit rather than face almost certain denial of

its claim upon resubmission to the Division, petitioner can hardly be heard to claim that it has been "ambushed," or misled, or otherwise deprived of its full day in court.

II.

The Circuit Court Did Not Exceed the Permissible Scope of the Appellate Inquiry.

While petitioner places its principal reliance upon the ground discussed above, a secondary claim is made that the Circuit Court failed to give proper weight and effect to the findings of the District Court (Brief, p. 23, where it is stated that the Circuit Court "erred in by-passing the * * * findings of the * * * District Court * * *" and p. 24, where it is said that "a Circuit Court of Appeals should not disturb a finding of the *District Court* when it is based on evidence subject to conflicting inferences").

In making this contention, petitioner has not correctly taken into consideration the rule of appellate review in a case of this nature. Under the Rules of Civil Procedure, in a non-jury case like this, it is no longer the rule that the findings of the trial court are binding on the appellate court if supported by any evidence. Particularly is this true where there is no dispute as to the basic facts, but only as to the inferences, conclusions, and ultimate facts to be drawn therefrom. In a non-jury case, where the evidence before the trial court is primarily documentary, as here, there is no reason for any rule according finality to the trial court's findings, for the trial court is in no better position to judge the credibility of the witnesses and the weight to be given to the evidence than is the appellate court. *Aetna Life Ins. Co. v. Kepler* (C.C.A. 8), 116 F.2d 1, 4; *Carr v. Southern Pacific Company* (C.C.A. 9),

128 F.2d 764, 768; *Western Union Tel. Co. v. Bromberg* (C.C.A. 9), 143 F.2d 288, 290; *Smith v. Royal Ins. Co.* (C.C.A. 9), 125 F.2d 222, 224 (cert. denied 316 U.S. 695).

Furthermore, it is not correct, as petitioner contends, that the Circuit Court "bypassed" a finding of the District Court. The controlling question in this case is whether the meals supplied to the waiters are part of their over-all "compensation." On this question the District Court made no finding.*

The only finding made by the District Court was that such meals were furnished as a working condition (R. 264, 265). The Circuit Court held this finding to be erroneous (R. 289), which it was entitled to do under the proper scope of the appellate inquiry in a case of this nature. Petitioner devotes the major part of its brief (pp. 26-36) to laboring the point that this was error, completely ignoring the added statement of the Circuit Court (R. 289):

> "If it were (a working condition), it nevertheless is a part of the wage or price."

The Third Division found, however, in the Opinion accompanying the award here in suit (No. 2663) that the meals were furnished pursuant to contract; and in its later award (No. 2699, copy attached as Appendix A) construed this as a finding that the meals were a part of the compensation of the employee entitled to them (R. 293). And compare petitioner's own statement in the proceedings before the Division (R. 253): " * * the furnishing of meals * * * by Respondent * * * was part of the price these managements were willing to pay to insure the desired service." As to this latter statement, petitioner now interestingly asserts (Brief, pp. 26-27) that in stating that the meals were "part of the price" it really meant that the meals were within "the law term 'consideration,' as used in contract law." If this be true, then the meals are all the more definitely established as part of the over-all compensation

Thus it at once appears that the finding of the District Court was not "bypassed," for the Circuit Court, while believing such finding erroneous, also viewed it as immaterial and considered that the result would be the same even if the finding were allowed to stand.

The District Court also found (R. 265) that the furnishing of meals by respondent to its dining-car waiters was "primarily for the benefit and convenience of respondent." This finding the Circuit Court on review of the record held not to be supported by the evidence (R. 291). Such holding is clearly within the scope of the appellate inquiry. Furthermore, it is in accord not only with all other court decisions on this same question, but also with the subsequent holding of the Third Division.* The following cases were cited by the Circuit Court:

Anderson v. Mt. Clemens Pottery Co., 69 F. Supp. 710 (R. 290);

Shelton v. Missouri-Kansas, etc. R. R. Co. (U.S.D.C. E.D.Mo.), 3 C.C.H. Labor Cases 60036, R. 168-176 (R. 297);

Brotherhood, etc. v. Nashville & St. L. Ry., 56 F. Supp. 559 (R. 296);

Pacific American Fisheries, Inc. v. United States, 138 F.2d 464 (R. 299).

In addition to these cases cited by the Circuit Court, its decision is also in accord with the decision in *Harris v. Lambros* (1932), 56 F.(2d) 488, where the question was whether the reasonable value of meals furnished to em-

*Award No. 2699 entitled: *Joint Council Dining Car Employees v. Chicago, Milwaukee, St. P. & Pacific R. Co.*, attached hereto as Appendix A, cited by the Circuit Court (R. 293).

ployees in restaurants and cafeterias, as a matter of custom and practice, came within the definition of "wages," in the Longshoremen's and Harbor Worker's Compensation Act (33 U.S.C.A., Sec. 902(13)). This act defined "wages" as:

> "The money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including *the reasonable value of board,* rent, housing, *lodging or similar advantages received from the employer,* * * *" (Emphasis supplied.)

In holding that the meals were part of the "wages," the court said (p. 489):

> "The facts as shown in this case are, it is true, somewhat different from those in the cases we have used by way of illustration, for here it is agreed defendant's employees were paid on a straight weekly basis *without any express agreement* they would be furnished meals, but, though there was no express agreement, there was admittedly a custom which had all the force and effect of an agreement, * * *
>
> "The silence, therefore, of the employer in engaging his help, with relation to the right to be fed at his cost, does not, in our opinion, alter the situation. It is the fact which controls, and here we have a case in which *employees, by reason of the nature of their employment, are relieved of the burden of providing food for themselves,* and the money value of that *benefit* is fixed by stipulation so that we are not left to speculation as to it. For the period in which the policy was in operation, *defendant's employees received their money compensation and their board, and the two together embraced their wages as defined by the statute, and embraced likewise the 're-*

> *muneration' on which the premium was calculated within the meaning of the contract,* and the reason for this is plain and simple, since, as we have seen, the whole purpose of the act is to provide indemnity to an injured employee based upon the wage loss sustained by him as a result of the injury, and to an employee of this defendant *the loss in such case would not be his wages alone, but his wages and his food, since each was a benefit which he enjoyed while employed* and is deprived of when injured." (Emphasis supplied.)

See also *California Employment Commission v. Black-Foxe Military Institute,* 43 Cal. App.(2d) Supp. 868, which involved the construction of the term "wages," in the California Unemployment Insurance Act (Deering's General Laws, Act 8780(d)). During part of the period covered by this case the term "wages" was defined (Sec. 11) as "the amount of money received as compensation for services rendered including * * * the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer." During the other part of the period covered by this case "wages" was defined (Sec. 11) as "all remuneration payable for personal services, including * * * the cash value of all remuneration payable in any medium other than cash."

The employer was an educational institution which required certain of its employees, for reasons of supervision and discipline of the cadets, to eat meals and lodge with them, such meals and lodging being furnished by the employer. There was no express agreement that such meals and lodging were to be a part of the employees' compensation.

The sole question was whether the value of such meals and lodging was part of the employees' "wages," as defined in the California Unemployment Insurance Act.

After discussing the "benefit and convenience rule" of the income tax cases (here relied on by petitioner, Brief, pp. 33, 34) and cases involving construction of the workmen's compensation laws where meals, lodging, etc. were held to be part of the employee's wages, the court said (p. 875):

> "This suggests, and we think it is true, that the real question arising under the so-called 'convenience rule' is whether the board, lodging or other facility furnished to the employee is in fact a part of his compensation for services rendered. If it is, it must be included as a part of his wages, at least under the law now in question, no matter how greatly the employer may be convenienced by the acceptance of such board, lodging or other facility by the employee."

The court accordingly held that the value of the meals and lodging furnished the employees was a part of their "wages."

CONCLUSION

There being no conflict between the decision of the Circuit Court and any decision of this Court or of any Circuit Court, and the decision of the Circuit Court being in accord with all of the authorities on the ultimate question in this case, it is submitted that the petition for a writ of certiorari should be denied.

Dated at San Francisco, February 2, 1948.

Respectfully submitted,

BURTON MASON,
Attorney for Respondent.

A. G. GOODRICH,
E. L. VAN DELLEN,
Of Counsel.

(Appendix Follows)

APPENDIX A

Award No. 2699
Docket No. DC-2660

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL OF DINING CAR EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes, Local No. 351, for and in behalf of H. B. Petrie, Waiter and other employes similarly situated for certain amounts deducted from their wages in violation of the agreed to past practice for more than twenty years and of Rule No. 4, of the current agreement. Further, that such payments be made retroactive to March 1, 1941, and in accordance with the provisions of this Agreement, Rule No. 4:

"Employes will be given a letter identifying them to be provided with meals in Dining Cars and sleeping accommodations."

OPINION OF BOARD: On July 1, 1936, the Carrier and the Organization here involved entered into a collective agreement governing working conditions of employes in the Dining Car Department. For many years prior to the execution of the foregoing Agreement the Carrier had paid uniform wages for each class of work performed

and had assigned uniform hours of service and terms of employment in accordance with prevailing customs for dining car employes in the railroad industry. In addition to the cash wages paid to its employes, the Carrier also furnished meals and sleeping accommodations at its own expense to dining car employes on duty or deadheading. We think the record shows that the furnishing of meals and sleeping accommodations to dining car employes prior to July 1, 1936, was a long established practice.

In the Agreement of July 1, 1936, the furnishing of meals and sleeping accommodations to dining car employes on duty was not mentioned. The Employes contend that the Carrier orally agreed to continue to provide them in accordance with the pre-existing practice. The Carrier denies that any such oral agreement was made. In any event, the Carrier did continue to provide meals and sleeping accommodations to these employes without charge for several years thereafter. There is no better yardstick in determining the intentions of parties to an agreement than the mutual interpretations which they themselves put upon it. It seems clear to us that the parties themselves intended, as demonstrated by their subsequent actions, that the furnishing of meals and sleeping accommodations to employes on duty or deadheading was a part of their pay in excess of the cash wages paid. It is just as much so as if the written agreement, after fixing the wage rate, had included the words "plus meals when on duty or deadheading." See Awards Nos. 2436 and 2663. Meals and lodging are not gifts or gratuities. If they were they could be taken away by the carrier at will. They must be, therefore, a part of the compensation of the employe entitled to them.

The Carrier contends, however, that the written agreement limited the furnishing of meals to employes deadheading in the interests of the Company as provided by Rule 4 of that agreement. We think this provision has the effect of extending the Carrier's obligation rather than limiting or abrogating the previously existing practice. Award No. 2663. The provision in the rule providing that "Employes will be given a letter identifying them to be provided with meals in dining cars and sleeping accommodations" is clearly for the purpose of readily identifying such employes and not intended as a limitation of the practice.

The Agreement of July 1, 1936, was amended effective January 1, 1938. No changes were made which would in any way affect the question at issue here. The Organization alleges that the Carrier orally agreed to continue the practice of providing meals to employes on duty or deadheading. The Carrier denies any such oral agreement. The Carrier did continue to furnish such meals until March 1, 1941. For the reasons previously recited, we think that the furnishing of meals continued to be a part of their pay in excess of the cash wages paid. This was the situation existing when the Fair Labor Standards Act of 1938, as modified by lawful processes under that Act, required the payment of a minimum wage of 30 cents per hour, effective October 24, 1939. At that time the Carrier began taking credit for meals and lodging furnished to the extent only of the difference between the negotiated rate of pay and the 30 cents per hour minimum established by the Fair Labor Standards Act. Effective March 1, 1941, the minimum wage rate under

the Fair Labor Standards Act was fixed at 36 cents per hour. The Carrier thereupon proceeded to take credit for meals and lodging furnished to the extent only of the difference between negotiated rate of pay and the rate of 36 cents per hour established by the Fair Labor Standards Act, or, if the meals and lodging furnished did not absorb the full amount, then only the reasonable cost thereof was charged to the employe. The reasonable cost has been determined to be the actual cost. No issue is raised here as to the correctness of the amounts deducted. The contention here is that no amounts should be deducted at all.

The basis for the foregoing method of calculating the pay of employes whose negotiated rate is less than the minimum required by the Fair Labor Standards Act, is a provision within that Act providing:

> "'Wage' paid to any employes includes a reasonable cost, as determined by the Administrator, to the employer of furnishing such employe with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employes. The term 'reasonable cost' is to be not more than the actual cost to the employer of the board, lodging or other facilities."

In Award No. 1727 this Board decided that the Carrier violated the agreement in charging the cost of meals against the difference between the negotiated rate and the minimum required by the Fair Labor Standards Act. That Award seems to have been followed in Award No. 2098. However, the Carrier in Award No. 1727 declined to put the Award into effect. In a suit to enforce the

Award in the District Court of the United States, that court held that where the carrier is obligated to furnish board to employes, and that said board was customarily furnished as part of the basic wage before the passage of the Fair Labor Standards Act, as well as thereafter, the carrier is entitled to claim an allowance for the reasonable cost of furnishing such board to employes, and the court declined to enforce the Award. Brotherhood of Maintenance of Way Employes, etc., et al., vs. The Nashville, Chattanooga & St. Louis Railway, No. 400-Civil, District Court of the United States, Middle District of Tennessee. We feel obliged to adhere to the foregoing court decision and to treat Award No. 1727 as having been disapproved by a higher tribunal having jurisdiction of the subject matter. Consequently, we are of the opinion that the Carrier had the right to charge for meals and lodging to the extent of the difference between the negotiated rate of pay and the minimum rate required by the Fair Labor Standards Act, up to the time, at least, when the wage increase effective December 1, 1941, became operative. In other words the deductions were legally made on August 31, 1941, a date that becomes important later in this opinion.

It must be borne in mind that the Fair Labor Standards Act did not affect collective agreements except in the cases of employes who received less pay than the minimum required by the Act and the regulation of maximum hours, a matter not here involved. Therefore, the negotiated Agreement of the parties is in effect except where it conflicts with the foregoing provisions of the Act.

On June 10, 1941, the Employes requested an increase

in wage rates in the amount of 30 cents per hour with a minimum hourly rate of 70 cents. This was refused by the Carrier and the services of the National Mediation Board were invoked. Mediation resulted in an agreement that employes would abide by the result of pending negotiations for wage increases by the fourteen non-operating organizations, and any increases granted would be made effective as of the date they became effective for the fourteen non-operating organizations. An increase of 10 cents per hour, with a minimum hourly wage of 46 cents, was granted the fourteen non-operating organizations effective December 1, 1941, and a 9 cents retroactive increase from September 1, 1941 to December 1, 1941. The wage agreement contained this provision:

> "From this minimum it is permissible to make deductions provided for by the Fair Labor Standards Act, for the reasonable cost of any board, lodging or other facilities furnished the employe, to the extent such deductions were being made as of August 31, 1941."

It is clear, therefore, that employes were entitled to a retroactive 9 cents per hour increase in pay from September 1, 1941 to December 1, 1941, and thereafter to an increase of 10 cents per hour, with a minimum hourly rate of 46 cents. And it is just as clear that the Carrier was entitled by the agreement to charge the actual cost of board and lodging to employes receiving less than the minimum rate on August 31, 1941 to the extent of the difference between the negotiated rate on August 31, 1941 and the minimum rate provided in the Fair Labor Standards Act at that time.

The Organization contends however that as it was not a party to the mediated wage agreement, effective December 1, 1941, that it is not bound by the section providing for legal deductions for meals and lodging. We think these agreed to deductions were just as much a part of the wage settlement as the hourly wage increases and the minimum hourly wage therein prescribed. It is clear to us that in granting the cash increases, it was contemplated by the parties that where the carrier was required to provide meals and lodging the actual cost thereof, not exceeding the amounts allowed on August 31, 1941, was to be considered as a part of the minimum wage required by the wage agreement. The Organization in agreeing to accept the increases granted to the fourteen non-operating organizations, is bound to take the whole agreement as it is, both the favorable and unfavorable portions thereof. In prescribing the minimum rate of 46 cents per hour, it was clearly contemplated that wages included not only cash but meals and lodging as well, and in determining whether the minimum rate provided by the wage agreement is being paid, the value of the money paid and the actual cost of meals and lodging, not exceeding the amounts deducted as of August 31, 1941, should be added together, the sum thus arrived at constituting the wages being paid within the purview of the wage agreement.

We have therefore arrived at the following conclusions: 1. Meals and lodging while on duty or deadheading in the interests of the carrier was a part of wages paid dining car employes prior to the agreement of July 1, 1936. 2. After July 1, 1936, such meals and lodging continued to be a part of the wages paid, the agreement

being silent with reference thereto and the parties continuing to mutually treat it as such. 3. That when the Fair Labor Standards Act became operative upon dining car employes of this character, as to employes affected by the Act, the carrier could properly deduct the actual cost of meals and lodging to the extent of the difference between the negotiated rate of pay and the minimum rate provided by the Act. 4. That when the "stand by agreement" of September 30, 1941 was entered into, the parties mutually agreed to accept the wage increases agreed upon by the fourteen non-operating organizations and carriers in mediation proceedings then pending. 5. That the agreement resulting from the foregoing mediation proceedings became binding upon the dining car employes herein involved, including the right of the carrier to deduct meals and lodging from the minimum rate therein provided to the same extent deductions were made as of August 31, 1941. 6. That as of August 31, 1941, deductions for meals and lodging were being made to the extent and not exceeding the difference in the negotiated rate under the collective agreement and the minimum provided in the Fair Labor Standards Act. 7. That under the wage agreement, effective December 1, 1941, under which these employes are bound by reference by the mediation agreement dated September 30, 1941, the carrier may, in accordance with the provisions thereof, deduct from the wages of those entitled to the minimum rate, the actual cost of meals and lodging but not exceeding the difference in the negotiated rate on August 31, 1941, and the minimum rate prescribed by the Fair Labor Standards Act on that same date.

The record indicates that the Carrier has been paying the claimant in accordance with the views herein expressed. Consequently, there has been no violation of the current agreement or of the mediated wage agreement effective December 1, 1941. No basis for an affirmative award exists.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That a violation of applicable agreements is not shown and no basis for an affirmative award exists.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of November, 1944.